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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 1371

SIGMUND GOLDBLATT, *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioner prays that a writ of certiorari issue to the United States Court of Appeals for the Fourth Circuit to review the order of that court entered April 8, 1969, denying petitioner's second petition for re-

hearing of a judgment affirming his conviction under a two-count indictment charging conspiracy and substantive violations of 18 U.S.C. § 1952(a)(3) (CA 2-3, 6-7).[1] Petitioner was sentenced to two years imprisonment (CA 418-419).

OPINIONS BELOW

The opinions of the court of appeals denying rehearing (the majority *per curiam* opinion, and the dissenting opinion of Judge Winter) have not yet been officially reported, but are set out in Appendix "A", *infra, pp.* 1a-5a. The earlier opinion of the court of appeals is reported at 392 F.2d 344 (4 Cir. 1968). The district court did not write or deliver an opinion.

JURISDICTION

The judgments of the court below were entered on February 5, 1968, and a petition for rehearing was thereafter denied. This Court denied timely petitions for a writ of certiorari, 392 U.S. 932, and for rehearing, 393 U.S. 902. After this Court decided *United States* v. *Nardello,* 393 U.S. 286, the court of appeals granted petitioner leave to file a second petition for rehearing and invited the Government to respond. On April 8, 1969, the court below handed down its opinions and entered an order denying rehearing. Thereafter, the court of appeals recalled its mandate of affirmance and stayed reissuance pending the filing and disposition of this petition. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1). See *Wichita Royalty Co.* v. *City National Bank,* 306 U.S. 103, 106.

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[1] The abbreviation "CA" refers to the consolidated appendix printed for use in the court below.

QUESTION PRESENTED

In construing a state criminal statute which forms an essential ingredient of the federal offense, is a federal court required to follow the decision of the state's highest court authoritatively construing the state statute, or is it free to approach the substantive state law question "generically?"

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The constitutional provisions involved are Art. I, § 9, cl. 3 (the *ex post facto* clause), and the Fifth and Sixth Amendments to the Constitution of the United States. The statutes involved are 18 U.S.C. §§ 371, 1952(a)(3), and §§ 18.1-278 and 18.1-279 of the Virginia Code. Pertinent portions of the constitutional provisions and statutes are set forth in Appendix "B" *infra.*

STATEMENT OF THE CASE[2]

Petitioner was convicted of conspiracy and substantive violations of 18 U.S.C. § 1952(a)(3) in connection with a zoning application in Fairfax County, Virginia (CA 2-3, 6-7). A concurrent sentence of imprisonment was imposed.[3]

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[2] A full statement of the facts is set forth in the Petition for Writ of Certiorari filed last term in *Wechsler* v. *United States*, No. 1377. The facts necessary to consideration of the legal issue tendered by this petition are set forth in the text.

[3] As the court of appeals recognized, 392 F.2d at 348 and n. 6, there is no evidence in the record to support petitioner's conviction on the substantive count of the indictment. The court below thought reversal of the substantive conviction "fruitless" in view of the concurrent sentence imposed. Cf. *Hirabayashi* v. *United States*, 320 U.S. 81.

Although petitioner maintained his innocence, he placed primary reliance on a legal defense. He contended that, notwithstanding that the final zoning occurred on July 25, 1962, any bribe in violation of Virginia's laws was *complete* prior to September 13, 1961 (the date 18 U.S.C. § 1952 was enacted), and, thus, it was impossible for any alleged conspirator to have used an interstate facility *after* § 1952 was enacted with *intent* to promote bribery under Virginia law.[4]

Central to petitioner's legal theory was the proposition that the crime of bribery under Virginia law was complete upon payment of the bribe.[5] To sustain this position, petitioner relied on the plain words of Virginia's bribery statute as construed by her highest court in *Ford* v. *Commonwealth,* 177 Va. 889, 15

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[4] As Judge Winter pointed out, if the Government proved anything at all, it proved a use of interstate facilities after enactment of § 1952 to realize a rezoning where, *prior to enactment of § 1952,* a supervisor had been bribed. 392 F.2d at 351-352. The jury was instructed, over objection, that these facts permitted conviction (CA 347, 359-360, 369, 373). The trial court also refused petitioner's request for an instruction that an *intent* to violate Virginia's bribery statute *after September 13, 1961* was required (CA 70, 358, 360).

[5] The Government conceded below (Br. for App. at 12 n. 5) that a check is a "thing of value" under Virginia law. Therefore, the Virginia crime of bribery was completed on September 9, 1961 when Supervisor Leigh wrote a check to Supervisor Cotten (CA 437). 392 F.2d at 353 (dissenting opinion). It is therefore immaterial that Cotten's bank subsequently negotiated the Leigh check in interstate commerce after enactment of § 1952, for the crime of bribery under Virginia law was already over. Even if this were not so, this check clearing transaction did not violate § 1952(a)(3) for the reasons which Judge Winter set forth. 392 F.2d at 353.

S.E.2d 50, 52 (1941). Petitioner clearly raised this issue at every step of the proceedings.[6]

The first time the case came before the Court of Appeals, it held that petitioner placed "a too heavy reliance on state law," 392 F.2d at 346, and ruled that "the *federal* crime continued until the re-zoning was accomplished on July 25, 1962." 392 F.2d at 347 (emphasis in original). Judge Winter dissented in an opinion which, in our view, is unassailable. 392 F.2d at 349-354.

This Court declined to review the case in that posture although it noted probable jurisdiction in another § 1952(a)(3) case the same day it denied certiorari in this one. *United States* v. *Nardello,* 392 U.S. 923. After *Nardello* was decided, 393 U.S. 286, however, the court below permitted petitioner to file a second petition for rehearing and called for briefs. The majority below thought *Nardello* reflected "some degree of impatience with fine lines, careful distinctions and labels" and read that case as permitting federal courts to look "at the elements of state crime generically." App. A at 3a. On that premise, it declined to follow the plain words of Virginia's bribery statute as authoritatively construed by her highest court. App. A at 2a. Judge Winter again dissented. *Id.* at 3a-5a.

REASONS FOR GRANTING THE WRIT

In *United States* v. *Nardello,* 393 U.S. 286, this Court held that when Congress used the words "extortion, bribery, or arson" in § 1952, it did not do so

[6] At trial, the issue was raised by a pre-trial motion to dismiss the indictment (CA 20, 80-86), by appropriate motion at the close of the Government's case (CA 288-289), and again at the close of the entire case (CA 343).

in the common law sense, but generically. The Court held that federal judges were to look at the *state* statute which a defendant had allegedly travelled interstate to violate and to determine first whether that statute could be classified generically as "extortion, bribery, or arson." If it could, federal prosecution was proper; if not, there was no federal crime. Having found the state statute to be one proscribing "extortion, bribery, or arson" generically, *Nardello* held that the next question was "whether the particular State involved prohibit[ed] the extortionate activity charged." 393 U.S. at 295.

This case presents the logical next step in this evolving and important area of federal criminal law. The question which *Nardello* did not answer, and which is squarely posed here, is *how* does a federal court decide whether the conduct proved constitutes a violation of the underlying state statute?[7] Believing that *Nardello* authorized it not merely to *classify* state extortion, bribery or arson statutes "generically," but also to *apply* the substantive elements of such statutes "generically," the court below refused to follow the clear words of Virginia's bribery statute as construed by Virginia's highest court. App. A at 2a. This holding raises profoundly troubling questions under § 1952 and the many other federal criminal statutes which incorporate, assimilate, or refer to state statutes as essential ingredients of federal crimes. *E.g.*, 18 U.S.C. §§ 13, 43, 892, 894, 922, 1073, 1084(b), 1153, 1262, 1821, 1953,

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[7] Following the decision in *Erie R. Co.* v. *Tompkins*, 304 U.S. 64, this Court granted certiorari to consider the similar problem arising in diversity cases. *E.g.*, *Wichita Royalty Co.* v. *City National Bank*, 306 U.S. 103, 106 (following denial of a second petition for rehearing below); *Six Companies* v. *Joint Highway District No. 13*, 311 U.S. 180.

2511(d). It also raises an important question of federal criminal law which has not been, but which should be, decided by this Court.

The court below would have federal courts view the substantive elements of state crimes "generically" when those crimes form a constituent part of a federal offense This approach, unwarranted by anything said in *Nardello,* collides head-on with this Court's repeated rulings that defendants are convicted of crimes *only if* their conduct violates a statute as written and not "because their conduct * * * thwarts a general purpose sought to be effected by specific commands which they have not disobeyed." *Viereck* v. *United States,* 318 U.S. 236, 245. Equally significant, the "generic element" approach renders the term "unlawful activity" as used in § 1952 unconstitutionally vague. If that term is deprived of the certainty provided by the qualification "in violation of state law" and is applied "generically" instead, the statute is obviously invalid. *E.g., United States* v. *L. Cohen Grocery Co.,* 255 U.S. 81.

In our view, substantive questions arising under a state criminal statute which is an essential ingredient of a federal offense should be decided by complementary application of two familiar principles. First, the state statute, like any penal statute, must be strictly construed. *E.g., United States* v. *Wiltberger,* 5 Wheat. 76, 96. Second, the federal court must follow authoritative state court rulings which construe the state statute in the absence of "convincing evidence" that the state court would no longer rule the same way. *E.g., Six Companies* v. *Joint Highway District No. 13,* 311 U.S. 180, 188; *Stoner* v. *New York Life Ins. Co.,* 311

U.S. 464, 467. See generally, *West* v. *American Telephone & Telegraph Co.*, 311 U.S. 223; *Fidelity Union Trust Co.* v. *Field,* 311 U.S. 169. In other words, the methods of applying the principles announced in *Erie R. Co.* v. *Tompkins,* 304 U.S. 64 are as much applicable to state law questions arising under a federal criminal statute as they are to state law questions arising in diversity cases. Such a test clearly comports with the Congressional purpose in closing the channels of interstate commerce to those who would violate a state's criminal statutes, while imparting certainty and consistency into the application of both federal and state criminal laws.

If that, or any similar test be followed here, the decision below must be reversed. Virginia's highest court has squarely held that Virginia's bribery statute "prohibits three specific acts—the giving of a bribe, the offer of a bribe and the promise of a bribe, *any one of which is a complete crime in itself.*" *Ford* v. *Commonwealth,* 177 Va. 889, 15 S.E.2d 50, 52 (1941) (emphasis added). Under the test we urge, the court below should have followed *Ford* unless it found "convincing evidence" that Virginia's highest court would now decide the issue differently. The "convincing evidence" is all the other way.

In the first place, *Ford* construes the very state statute at issue here—a statute whose prohibitory verbs are "give, offer or promise" (§ 18.1-278) on the part of the bribor, and "accept" (§ 18.1-279) on the part of the bribee. Second, with *Ford's* construction on the books for a quarter of a century, the Virginia Legislature enacted still another bribery statute during its 1968 session and used substantially identical prohibi-

tory verbs. §§ 18.1-282.1-282.4, Va. Code (1968 Supp.).[8] Finally, the *Ford* construction is in accord with the settled common law rule,[9] the settled rule in the federal courts[10] and the settled rule in every state which has considered the problem[11]—all of which hold that the crime of bribery does not continue *past payment* of the bribe. Cf. *United States* v. *Irvine,* 98 U.S. 450, 451. In short, the court below refused to give authoritative weight to a construction of Virginia's bribery statute by Virginia's highest court in an opinion which not only fails to set forth "convincing evidence" for the contrary result, but which is devoid of any authority at all.

The rejection below of controlling state precedent and the adoption of the "generic element" test poses a question which is bound to recur. Indeed, it lurks in every prosecution for violating any federal statute which makes a state crime an essential ingredient of

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[8] The new statute, which supplements the statute involved here, prohibits the offer, conferring or agreement to confer a bribe on the part of the bribee (§ 18.1-292.2(1)) and the acceptance, or agreement to accept a bribe on the part of the bribor (§ 18.1-292.2(2)).

[9] *E.g.,* 3 Wharton's Criminal Law § 1383, p. 776 (1957 ed.).

[10] *E.g., Howard* v. *United States,* 345 F.2d 126, 128 (1 Cir. 1965); *Stephens* v. *United States,* 347 F.2d 722, 724 (5 Cir. 1965); *Wolf* v. *United States,* 292 Fed. 673, 675 (6 Cir. 1923).

[11] *E.g., State* v. *Bloqmenstiel,* 235 La. 860, 106 So.2d 288 (1958); *State* v. *Knight,* 54 Ohio St. 330, 43 N.E. 281 (1896); *State* v. *Harrah,* 101 W. Va. 300, 132 S.E. 654 (1926); *Curtis* v. *State,* 113 Ohio St. 187, 148 N.E. 834 (1925); *People* v. *Willis,* 24 Misc. 549, 54 N.Y.S. 52 (1898); *State* v. *Begyn,* 34 N.J. 35, 167 A.2d 161 (1960).

the federal offense.[12] Because of its obvious importance and because the *Wiltberger-Erie* solution which we urge is so clearly correct, this Court should grant certiorari to decide the question now.

CONCLUSION

By reason of the foregoing, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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[12] With fifty penal codes construed by fifty state supreme courts, differing interpretations of the same generic offenses are to be expected. One example will suffice. In Mississippi and Ohio, it is a defense to an extortion prosecution that the defendant had a good faith belief that he was entitled to the money notwithstanding the fact that he "generically" extorted it from the debtor by threat of criminal prosecution. *State* v. *Ricks*, 108 Miss. 7, 66 So. 281 (1914); *State* v. *Barger*, 111 Ohio St. 448, 145 N.E. 857 (1924). On the other hand, New York and California do not recognize such a defense. *People* v. *Fichtner*, 281 App. Div. 159, 118 N.Y.S.2d 392, 398 (1952); *Lindenbaum* v. *State Bar*, 26 Cal.2d 565, 160 P.2d 9 (1945).

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 11,331

UNITED STATES OF AMERICA, *Appellee,*
versus
NATHAN WECHSLER, *Appellant.*

No. 11,352

UNITED STATES OF AMERICA, *Appellee,*
versus
ROBERT C. COTTEN, JR., *Appellant.*

No. 11,355

UNITED STATES OF AMERICA, *Appellee,*
versus
SIGMUND GOLDBLATT, *Appellant.*

No. 11,356

UNITED STATES OF AMERICA, *Appellee,*
versus
A. CLAIBORNE LEIGH, *Appellant.*

Appeals from the United States District Court for the Eastern District of Virginia, at Alexandria.
Oren R. Lewis, District Judge.

(Decided April 8, 1969).

Before HAYNSWORTH, Chief Judge, and WINTER and CRAVEN, Circuit Judges.

Order

PER CURIAM:

A divided panel of this court affirmed the convictions of these defendants under 18 U.S.C. § 371, 1952, on February 5, 1968. On March 7, 1968, the court denied a petition for

rehearing en banc by a vote of five to one, with one judge abstaining. Subsequently, the original panel unanimously affirmed denial of a motion for a new trial lodged in the district court. Recently the same panel authorized the filing of a second petition for rehearing based upon the decision of the United States Supreme Court in *United States* v. *Nardello*, — U.S. —, 37 L.W. 4073 (Jan. 13, 1969). In response to our invitation, the appellants and the United States have submitted briefs and we have carefully considered them. After consultation with non-panel members of the court, we now reject the second petition for rehearing.

We do not read *Nardello* as undercutting our prior decision. The issue that divided us before was that of the duration of bribery admittedly prohibited by the State of Virginia—whether it extended to that point in time at which the zoning corruption was accomplished. We thought that it did despite language in the Virginia cases that the crime of bribery is complete when the bribe is paid.[1] Doubtless in Virginia an indictment need not charge that the briber got his *quid pro quo*, but it does not follow that the Supreme Court of Appeals of Virginia would adopt the same language in construing its statute if the payment and receipt of the money were beyond the jurisdiction. We think it not at all clear that if these corrupt zoning officials had received their bribes in the District of Columbia, for example, that their subsequent activity in Virginia to procure rezoning would be beyond the reach of Virginia's bribery statute.

Nardello,[2] *supra*, displays, we think, some degree of impatience with fine lines, careful distinctions and labels. It

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[1] We noted that Cotten's bribe was deposited in his account two days after enactment of the Travel Act. 392 F.2d 344, 347.

[2] The Supreme Court noted probable jurisdiction in *Nardello* on June 17, 1968, the same date on which it denied certiorari in this case.

rejects the contention that "peculiar versions of state terminology are controlling," and looks at the elements of state crime generically. The question is said to be "whether the particular state involved prohibits the extortionate activity charged." We do not doubt that Virginia does. It is made plain that the term "extortion" as used in the Travel Act was not intended to track closely the legal understanding under state law. It is enough that the corrupt activity of the appellants in procuring rezoning was illegal under Virginia law.

The petition for rehearing is

DENIED.

WINTER, *Circuit Judge*, dissenting:

In dissenting from the affirmance of the judgments of conviction, I was of the view that 18 U.S.C.A. § 1952 was inapplicable because the state crime of bribery had been completed before the use of facilities in interstate commerce to accomplish an unlawful state purpose was made illegal. It followed, so I thought, that the majority's view gave unconstitutional retrospective effect to the federal statute and tortured the meaning of the federal statute by holding illegal the use of facilities in interstate commerce unaccompanied by any intent to violate state law. *United States* v. *Wechsler*, 392 F. 2d 344, 349-354 (4 Cir. 1968).

United States v. *Nardello*, — U. S. —, 21 L.Ed. 2d 487 (1969), only confirms my view. It is replete with references to the concept that the federal act was intended to aid state law enforcement authorities *in the enforcement of state law*. In performing this supplementary purpose, the federal act cannot apply where state law is inapplicable. Where the state crime is complete, subsequent use of interstate facilities is not made illegal under federal law.

To avoid the plain thrust of *Nardello,* the majority significantly shifts the basis of its prior decision. In speaking originally, the majority said:

> "We have no doubt that when the money passed, if not before, the state law of bribery had been violated and that appellants could then have been indicted in the state courts; in that sense their crime was *complete.* But their crime was not yet completed. * * * The manifest purpose of the statute is to deny the use of facilities in interstate commerce to those who would effect a wrong on the people by corrupting public officials. The wrong was not done to the people until the re-zoning was accomplished and the accomplishment of that wrong, after the use of a facility in interstate commerce, is one of the activities at which the statute is aimed. Thus, the *federal* crime continued until the re-zoning was accomplished on July 25, 1962." 392 F. 2d 346-347 (emphasis in original).

Now the majority seeks to explain its prior holding by the statement:

> "The issue that divided us before was that of the duration of bribery admittedly prohibited by the State of Virginia—whether it extended to that point in time at which the zoning corruption was accomplished. We thought it did despite the language in the Virginia cases that the crime of bribery is complete when the bribe is paid. Doubtless in Virginia an indictment need not charge that the briber got his *quid pro quo,* but it does not follow that the Supreme Court of Appeals of Virginia would adopt the same language in construing its statute if the payment and receipt of the money were beyond that jurisdiction. We think it not at all clear that if these corrupt zoning officials had received their bribes in the District of Columbia, for example, that their subsequent activity in Virginia

to procure rezoning would be beyond the reach of Virginia's bribery statute." (footnote eliminated.)

That initially the majority purported to rely on federal law even though it now claims that it relied on state law, and that its opinions are thus mutually contradictory are manifest.

Two other comments are in order. First, for its initial statement the majority relied heavily on an authority which no longer exists. See, present opinion in *United States* v. *Wingo,* 394 F. 2d 484 (6 Cir. 1968). Second, in its latest expression, the majority need not speculate what the Supreme Court of Appeals of Virginia may hold with regard to corrupt public officials who receive bribes outside of the state of Virginia and then return. In such instances, the Virginia statutes make the promise, offer or gift of a bribe, as well as acceptance of the bribe, a criminal act, without more. 4 *Code of Virginia* (1960 Repl. Vol.) §§ 18.1-278; 18.1-279. The holding should be clear. This is no indication, however, that Virginia would treat as proscribed conduct acts occurring after payment of the bribe. To the contrary, *Ford* v. *Commonwealth,* 15 S.E. 2d 50, 52 (Va. 1941), tells us "[i]t [the statute] prohibits three specific acts—the giving of a bribe, the offer of a bribe and the promise of a bribe, any one of which is a complete crime in itself." Certainly, there is no warrant for concluding that the Virginia law extended to the rezoning, so as to carry with it the federal law, as to these defendants.

For the reasons I originally stated and on the authority of *Nardello,* I dissent from the denial of the petition for rehearing.

APPENDIX B

Article I, § 9, cl. 3 of the Constitution of the United States provides:

> No bill of Attainder or ex post facto Law shall be passed.

The Fifth Amendment to the Constitution of the United States provides in pertinent part:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury * * * ; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law * * *.

The Sixth Amendment to the Constitution of the United States provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right * * * to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defence.

18 U.S.C. § 371 provides, in pertinent part:

> If two or more persons conspire * * * to commit any offense against the United States * * * and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

18 U.S.C. § 1952 provides, in pertinent part:

(a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to—

(1) distribute the proceeds of any unlawful activity; or

(2) commit any crime of violence to further any unlawful activity; or

(3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,

and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3), shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

(b) As used in this section "unlawful activity" means

* * *

(2) extortion, bribery, or arson in violation of the laws of the State in which committed or of the United States.

* * *

Virginia Code § 18.1-278 provides:

Bribes to officers or candidates for office.—If any person corruptly give, offer or promise to any executive, legislative or judicial officer, sheriff or police officer, or to any candidate for such office, either before or after he shall have taken his seat, any gift or gratuity, with intent to influence his act, vote, opinion, decision or judgment on any matter, question, cause or proceeding, which is or may be then pending, or may by law come or be brought before him in his

official capacity, he shall, upon conviction, be confined in the penitentiary not less than one nor more than ten years. This section shall also apply to a resident of this State who, while temporarily absent therefrom for that purpose, shall make such gift, offer or promise and thereafter return to this State.

Virginia Code § 18.1-279 provides:

Acceptance thereof by officer.—If any executive, legislative or judicial officer, sheriff or police officer, or any candidate for such office, accept in this State, or if, being resident in this State, such officer or candidate shall go out of this State and accept and afterwards return to and reside in this State, any gift or gratuity or any promise to make a gift or do any act beneficial to such officer or candidate under an agreement, or with an understanding, that his vote, opinion or judgment shall be given on any particular side of any question, cause or proceeding which is or may be by law brought before him in his official capacity or that in such capacity he shall make any particular nomination or appointment or take or fail to take any particular action or perform any duty required by law, he shall, upon conviction, be confined in the penitentiary not less than one nor more than ten years and shall forfeit his office and be forever incapable of holding any post mentioned in § 2-26. The word candidate as used in this and the preceding section shall mean anyone who offers himself or is put forward by others as a suitable person or an aspirant for such office.

SUPREME COURT, U. S.

FILED
MAY 6 1969
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1968

No. 1372

ROBERT C. COTTEN, JR., *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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IN THE

Supreme Court of the United States

OCTOBER TERM 1968

No.

ROBERT C. COTTEN, JR., *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioner Robert C. Cotten, Jr. prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit denying his second petition for re-hearing.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit, originally affirming petitioner's conviction is reported at 392 F. 2d 344 (4th Cir. 1968). The opinion of the Court on the second petition for rehearing has not yet been reported and is reprinted as an appendix to this petition.

JURISDICTION

The petitioner and five others were convicted in the United States District Court for the Eastern District of Virginia in January of 1967 for violating 18 U.S.C. §§ 371, 1952 and sentenced to a term of imprisonment. The United States Court of Appeals for the Fourth Circuit, one judge dissenting, affirmed the conviction. 392 F. 2d 344 (4th Cir. 1968). This Court denied certiorari, 392 U.S. 932 (1968), at the same time noting probable jurisdiction in *United States* v. *Nardello,* 392 U.S. 923 (1968). Based upon the subsequent decision of this Court in *Nardello,* 393 U.S. 286 (1969), petitioner sought and was given leave to file a second petition for rehearing in the Court below and bail pending its outcome was granted. The judgment of the Court below denying the second petition for rehearing, one judge dissenting, was entered on April 8, 1969.[1] The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT

The facts of the case are succinctly set forth by the Court below in its original opinion and, in the interest of brevity, are adopted here.

"Involved here is a scheme by certain partners in a real estate development company (Nathan Wechsler, Sigmund Goldblatt, George Faigen, and Seymour Faigen) to bribe two members of the Board of Super-

[1] Involved in the proceedings below were three other defendants, Nathan Wechsler, Sigmund Goldblatt and A. Claiborne Leigh, each of whom, we are advised, is filing a separate petition in this Court. We ask the Court to consider them together and we adopt and rely upon the arguments to be made by the three other petitioners.

visors of Fairfax County, Virginia, (Robert Cotten and Claiborne Leigh) to vote for the re-zoning of land in which the partnership was interested. * * *

"In 1960, the developer-defendants were interested in procuring a zoning change from residential to mobile homes for 84.3 acres of land in Fairfax Count which they wanted to use as a trailer park. Sufficient evidence was introduced at trial for the jury to find the following facts. On March 9, 1960, George Faigen filed an application for the re-zoning. A year later, but before the Board of Supervisors had acted upon the application, the four defendant-partners placed a check for $5,500 in escrow in the Security Bank of Washington for John C. Somers, an attorney who often handled zoning cases in Fairfax County on a contingent fee basis, conditioned upon favorable action by the Board. Two months later, on July 26, 1961, the Board acted favorably on Faigen's application on the affirmative votes of Leigh, Cotten, DeBell and another. On August 7, the developer-defendants instructed the Security Bank to release the $5,500 check to Somers who deposited it to his own account on August 18, the day on which he was notified by the bank. Somers was instructed by Leigh to run the check through his own account and then make out a check for the same amount to Leigh, and did so. Somers had performed no work for developer defendants at any time, and in 1961 he knew none of them except Goldblatt. Leigh deposited the check to his account on August 19, and on August 22 he wrote a check to [Supervisor Stuart T.] DeBell [acquitted in the trial court] for $1,308.33; on August 23, he wrote a check to himself for $1,333; and on September 9, he wrote a check to Cotten for $1,000. Cotten's secretary entered the $1,000 check as a legal fee in

Cotten's checkbook and receipts book and deposited the check to Cotten's account on September 15. On September 13, 1961, Congress enacted 18 U.S.C. § 1952. Because the state courts of Virginia set aside the original Board action, it was necessary for George Faigen to file a new application on June 20, 1962. This second application was considered by the Board on July 25, 1962, and again it was approved, this time on the affirmative votes of Cotten, Leigh, DeBell, and two others. Three letters, two by Goldblatt and one by George Faigen, connected with the effort to procure the re-zoning were mailed on June 17 and 18 and on July 21, 1962." 392 F. 2d 344, 345-346 (4th Cir. 1968).

Supervisor A. Claiborne Leigh and this petitioner were convicted as were four of the developer defendants and the convictions were affirmed by the Court below. *United States* v. *Wechsler,* 392 F. 2d 344 (4th Cir. 1968). This Court denied certiorari, 392 U.S. 932 (1968), and denied a petition for rehearing, 393 U.S. 902 (1968).

REASONS FOR GRANTING THE WRIT

Both the original opinion of the Court below and its opinion on rehearing are, as the dissenting judge points out, squarely at odds with this Court's holding in *United States* v. *Nardello,* 393 U.S. 286 (1969). Throughout *Nardello,* this Court has made clear that the unlawfulness of an activity under the Travel Act, 18 U.S.C. § 1952, is to be measured by state law. So measured, it is clear that the conduct which was brought into question by the indictment in this case had been been completed prior to the enactment of Section 1952 and, accordingly, no federal law was violated by the petitioner.

The indictment was brought under 18 U.S.C. § 1952 (a)(3) and it charged the defendants with using interstate facilities "to establish and carry on and facilitate the establishment and carrying on of an unlawful activity by the bribery of officers of the State of Virginia in violation of the laws of the State of Virginia: to-wit, 18.1-278 and 18.1-279 of the Code of Virginia." Those sections of the Virginia Code make the promise, offer, or gift to, or the acceptance by, a public official the criminal act of bribery. The highest court of Virginia has authoritatively held that the criminal act under this statute is completed upon the giving, offering or promising of such bribe, notwithstanding that the official act to be done in consideration therefor is to occur in the future. *Ford* v. *Commonwealth,* 177 Va. 889, 15 S.E. 2d 50 (1941). The state crime of bribery, and necessarily the crime under Section 1952, was completed no later than sometime in August of 1961, at which time the $5,500 check was released to Supervisor Leigh. Since the Travel Act was not passed until September 13, 1961, no federal crime was violated at the time the bribery was committed.[2]

The trial court time and time again instructed that the defendants were charged with "illegally obtaining a zoning". The Court below compounded that error by holding that the duration of the bribery prohibited by the Virginia statute continued until "the zoning corruption was accomplished". This flies squarely in

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[2] It is to be noted that the defendants were *not* indicted under Section 1951(a)(1) for distributing the proceeds of an unlawful activity. Such an indictment might have withstood attack in view of this petitioner's deposit of the check *after* the effective date of the statute. We are not here concerned with that situation because that is not the manner in which the grand jury returned the indictment.

the face of *Ford* v. *Commonwealth, supra,* which specifically holds that the statute "prohibits three specific acts—the giving of a bribe, the offer of a bribe, and the promise of a bribe, *any one of which is a complete crime in itself.*" (Emphasis supplied) If, as *Nardello* teaches, the unlawful activity proscribed by Section 1952(a)(3) is to be judged by the scope of the activity prohibited by the underlying state law, this petitioner's crime had been completed prior to the time the Travel Act became effective. It follows, therefore, that since the crime of bribery under Virginia law was complete upon either the agreement or acceptance, irrespective of whether the improper official act had yet been taken, the object of the conspiracy charged in the Indictment was fully accomplished. And, "[W]hen the object of a conspiracy has been fully accomplished, no act subsequently done can *possibly* be an act done to effect the object of the conspiracy." *Rose* v. *St. Clair,* 28 F. 2d 189, 191 (D.C. W.D. Va. 1928); *Lonabaugh* v. *United States,* 179 Fed. 476, 481 (8th Cir. 1910); *DeLuca* v. *United States,* 299 Fed. 741, 745 (2d Cir. 1924); *United States* v. *McGee,* 108 F. Supp. 909, 912-913 (D.C. Wyo. 1952), and cases cited.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted.

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May 8, 1969

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 11,331
UNITED STATES OF AMERICA, *Appellee,*
v.
NATHAN WECHSLER, *Appellant.*

No. 11,352
UNITED STATES OF AMERICA, *Appellee,*
v.
ROBERT C. COTTEN, JR., *Appellant.*

No. 11,355
UNITED STATES OF AMERICA, *Appellee,*
v.
SIGMUND GOLDBLATT, *Appellant.*

No. 11,356
UNITED STATES OF AMERICA, *Appellee,*
v.
A. CLAIBORNE LEIGH, *Appellant.*

Appeals from the United States District Court for the Eastern District of Virginia, at Alexandria

For reasons appearing to the Court in their per curiam opinion,

IT IS ORDERED that the second petition for rehearing is denied, pursuant to Local Rule 5(a).

For the Court—by direction.

s/ SAMUEL W. PHILLIPS
Clerk

Filed April 8, 1969
SAMUEL W. PHILLIPS
Clerk (SEAL)

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By MARGERET P. ATKINS
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Order

PER CURIAM:

A divided panel of this court affirmed the conviction of these defendants under 18 U.S.C. § 371, 1952, on February 5, 1968. On March 7, 1968, the court denied a petition for rehearing en banc by a vote of five to one, with one judge abstaining. Subsequently, the original panel unanimously affirmed denial of a motion for a new trial lodged in the district court. Recently the same panel authorized the filing of a second petition for rehearing based upon the decision of the United States Supreme Court in *United States* v. *Nardello,* U.S. , 37 L.W. 4073 (Jan. 13, 1969). In response to our invitation, the appellants and the United States have submitted briefs and we have carefully considered them. After consultation with non-panel members of the court, we now reject the second petition for rehearing.

We do not read *Nardello* as undercutting our prior decision. The issue that divided us before was that of the duration of bribery admittedly prohibited by the State of Virginia—whether it extended to that point in time at which the zoning corruption was accomplished. We thought that it did despite language in the Virginia cases that the crime of bribery is complete when the bribe is paid.[1] Doubtless in Virginia an indictment need not charge that the briber got his *quid pro quo,* but it does not follow that the Supreme Court of Appeals of Virginia would adopt the same language in construing its statute if the payment and receipt of the money were beyond the jurisdiction. We think it not at all clear that if these corrupt zoning officials had received their bribes in the District of Columbia, for example, that their subsequent ac-

[1] We noted that Cotten's bribe was deposited in his account two days after enactment of the Travel Act. 392 F.2d 344, 347.

tivity in Virginia to procure rezoning would be beyond the reach of Virginia's bribery statute.

Nardello,[2] *supra,* displays, we think, some degree of impatience with fine lines, careful distinctions and labels. It rejects the contention that "peculiar versions of state terminology are controlling," and looks at the elements of state crime generically. The question is said to be "whether the particular state involved prohibits the extortionate activity charged." We do not doubt that Virginia does. It is made plain that the term "extortion" as used in the Travel Act was not intended to track closely the legal understanding under state law. It is enough that the corrupt activity of the appellants in procuring rezoning was illegal under Virginia law.

The petition for rehearing is

DENIED.

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[2] The Supreme Court noted probable jurisdiction in *Nardello* on June 17, 1968, the same date on which it denied certiorari in this case.

WINTER, Circuit Judge, dissenting:

In dissenting from the affirmance of the judgments of conviction, I was of the view that 18 U.S.C.A. § 1952 was inapplicable because the state crime of bribery had been completed before the use of facilities in interstate commerce to accomplish an unlawful state purpose was made illegal. It followed, so I thought, that the majority's view gave unconstitutional retrospective effect to the federal statute and tortured the meaning of the federal statute by holding illegal the use of facilities in interstate commerce unaccompanied by any intent to violate state law. *United States* v. *Wechsler*, 392 F. 2d 344, 349-354 (4 Cir. 1968).

United States v. *Nardello*, U.S. , 21 L. Ed. 2d 487 (1969), only confirms my view. It is replete with references to the concept that the federal act was intended to aid state law enforcement authorities *in the enforcement of state law*. In performing this supplementary purpose, the federal act cannot apply where state law is inapplicable. Where the state crime is complete, subsequent use of interstate facilities is not made illegal under federal law.

To avoid the plain thrust of *Nardello*, the majority significantly shifts the basis of its prior decision. In speaking originally, the majority said:

> "We have no doubt that when the money passed, if not before, the state law of bribery had been violated and that appellants could then have been indicted in the state courts; in that sense their crime was *complete*. But their crime was not yet completed. * * * The manifest purpose of the statute is to deny the use of facilities in interstate commerce to those who would effect a wrong on the people by corrupting public officials. The wrong was not done to the people until the rezoning was accomplished and the accomplishment of that wrong, after the use of a facility in interstate commerce, is one of the activities at which

> the statute is aimed. Thus, the *federal* crime continued until the re-zoning was accomplished on July 25, 1962." 392 F. 2d 346-347 (emphasis in original).

Now the majority seeks to explain its prior holding by the statement:

> The issue that divided us before was that of the duration of bribery admittedly prohibited by the State of Virginia—whether it extended to that point in time at which the zoning corruption was accomplished. We thought it did despite the language in the Virginia cases that the crime of bribery is complete when the bribe is paid. Doubtless in Virginia an indictment need not charge that the briber got his *quid pro quo*, but it does not follow that the Supreme Court of Appeals of Virginia would adopt the same language in construing its statute if the payment and receipt of the money were beyond that jurisdiction. We think it not at all clear that if these corrupt zoning officials had received their bribes in the District of Columbia, for example, that their subsequent activity in Virginia to procure rezoning would be beyond the reach of Virginia's bribery statute." (footnote eliminated.)

That initially the majority purported to rely on federal law even though it now claims that it relied on state law, and that its opinions are thus mutually contradictory are manifest.

Two other comments are in order. First, for its initial statement the majority relied heavily on an authority which no longer exists. See, present opinion in *United States* v. *Wingo*, 394 F. 2d 484 (6 Cir. 1968). Second, in its latest expression, the majority need not speculate what the Supreme Court of Appeals of Virginia may hold with regard to corrupt public officials who receive bribes outside of the state of Virginia and then return. In such instances, the Virginia statutes make the promise, offer or

gift of a bribe, as well as acceptance of the bribe, a criminal act, without more. 4 *Code of Virginia* (1960 Repl. Vol.) §§ 18.1-278; 18.1-279. The holding should be clear. This is no indication, however, that Virginia would treat as proscribed conduct acts occurring after payment of the bribe. To the contrary, *Ford* v. *Commonwealth,* 15 S.E. 2d 50, 52 (Va. 1941), tells us "[i]t [the statute] prohibits three specific acts—the giving of a bribe, the offer of a bribe and the promise of a bribe, any one of which is a complete crime in itself." Certainly, there is no warrant for concluding that the Virginia law extended to the rezoning, so as to carry with it the federal law, as to these defendants.

For the reasons I originally stated and on the authority of *Nardello,* I dissent from the denial of the petition for rehearing.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. **1373**

NATHAN WECHSLER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No.

NATHAN WECHSLER,

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v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioner prays that a writ of certiorari issue to the United States Court of Appeals for the Fourth Circuit to review the order of that court entered April 8, 1969 denying a petition for rehearing based on the ground that that court's earlier affirmance of petitioner's conviction, *United States v. Wechsler*, 392 F.2d 344 (1968), conflicted with this Court's intervening opinion in *United States v. Nardello*, 393 U.S. 286 (1969). Petitioner has been sentenced to two years'

imprisonment but has been admitted to bail by the Circuit Court pending the filing of and this Court's action on this petition for certiorari.

OPINIONS BELOW

The opinions of the Court of Appeals for the Fourth Circuit (the per curiam opinion of the court and the dissenting opinion of Judge Winter), dated April 8, 1969, have not been officially reported but are set out in Appendix A, *infra* p. 19. An earlier decision by the Court of Appeals is reported in *United States v. Wechsler*, 392 F.2d 344 (1968), (Appendix A, p. 24), and the Court of Appeals thereafter denied a petition for rehearing en banc. A Petition for a Writ of Certiorari to review the earlier decision was denied on June 17, 1968, *Wechsler v. United States*, 393 U.S. 902. Thereafter on the strength of *United States v. Nardello*, 393 U.S. 286 (1969), petitioner filed with the Court of Appeals a motion for leave to file a second petition for rehearing. This motion was granted (Appendix A, p. 23) and resulted in the order of April 8, 1969.

On April 15, 1969, the Court of Appeals for the Fourth Circuit admitted petitioner to bail pending certiorari to this Court. A copy of this Order is set out in Appendix A, p. 40. Thereafter the Court of Appeals entered an Order (Appendix A, p. 40) staying the mandate pending application for a Writ of Certiorari.

JURISDICTION

The order of the court below was entered on April 8, 1969. Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1). See *Wichita Royalty Co. v. City National Bank*, 306 U.S. 103 (1939).

QUESTIONS PRESENTED

1. Has the court below interpreted the Travel Act, 18 U.S.C. 1952, in a manner which is in conflict with *United States v. Nardello*, 393 U.S. 286 (Jan. 13, 1969)?

2. Does the decision of the court below create uncertainty in the administration of justice or in the future interpretation of the Travel Act by the lower federal courts in that it

(a) makes the Travel Act applicable, on the same facts and under similar state statutes, in some states and not in others, or

(b) creates new federal crimes where none exists under the Travel Act, or

(c) creates uncertainty as to the time that the federal statute of limitations (18 U.S.C. 3282) begins to run?

3. Where a federal statute incorporates a state criminal statute, and the state crime involved in the case is complete before the enactment of the federal statute, is the federal statute *ex post facto* the offense?

4. Where the district court instructs the jury that the "unlawful activity" under the Travel Act is "obtaining a rezoning via bribery" but refuses to charge that if the jury should find that any bribery was completed before enactment of the Travel Act it should acquit, does *Nardello* require a new trial?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The constitutional provision involved is Art. I, §9, cl. 3 (the *ex post facto* clause). The statutes involved are 18 U.S.C. 1952 and Sections 278 and 279 of Title 18.1 of the Virginia Code. The constitutional provision and statutes are set forth in Appendix B, p. 41.

STATEMENT OF THE CASE

Petitioner and eight others were indicted in a two-count indictment for (1) conspiring under 18 U.S.C. 371 to violate the Travel Act, 18 U.S.C. 1952(a)(3) [Appendix B, p. 41], and (2) violating the substantive provisions of 18 U.S.C. 1952(a)(3) by using interstate facilities with intent to promote, establish, manage and carry on and facilitate the promotion, establishment, management and carrying on of bribery under the laws of Virginia.[1] Three of the other eight defendants were acquitted by the court at the close of the Government's case. Petitioner and one other were acquitted by the court on Count 2 (the substantive count) at the close of the Government's case but were convicted by the jury on Count 1 (the conspiracy count).[2] The remaining three defendants were convicted by the jury on Counts 1 and 2.

One of petitioner's co-defendants is filing a petition for a writ of certiorari simultaneously herewith. *Goldblatt v. United States*, No. _____. This petitioner adopts and incorporates by reference the petition in that case.

So far as is now pertinent, the Travel Act was allegedly violated by the giving of $5500 by petitioner and three other land developers to one John C. Somers, a zoning attorney; by the giving of $5500 by Somers to the defendant A. Claiborne Leigh, a county supervisor; and by the distribution of $3,641.33 by Leigh to himself and two

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[1] For brevity, petitioner will hereafter use the word "promote" in place of the full wording of the statute, which is "promote, manage, establish, carry on, or facilitate the promotion, management, establistment or carrying on." In Count 1 he was charged with conspiracy "to establish and carry on and facilitate the establishment and carrying on" of bribery.

[2] Although the point is not urged herein, the acquittal on Count 2 and the conviction on Count 1 are mutually exclusive, *Pinkerton v. United States*, 328 U.S. 640 (1946).

other supervisors, all in return for a favorable vote on a rezoning application.[3]

Dates are important. The Travel Act was enacted on September 13, 1961. Any act of bribery in this case was complete before that date. The zoning application was granted six weeks before the statute's enactment, on July 26, 1961; the $5500 was given to Somers (who was granted immunity and not prosecuted) on August 18, 1961 by the bank which was holding it in escrow; Somers deposited the $5500 in his bank account and in turn gave his check for $5500 to Leigh (who was convicted on both counts) on August 19, 1961; Leigh wrote and presumably gave checks to the defendant-supervisor DeBell (who was acquitted by the Court) for $1,308.33 on August 22, 1961, to himself for $1,333.00 on August 23, 1961, and to the defendant-supervisor Cotten (who was convicted on both counts) for $1,000 on September 9, 1961; and Cotten deposited his check on September 15, 1961.

The Travel Act provides that whoever uses an interstate facility to promote bribery under Virginia law, and thereafter performs an act to promote bribery shall be guilty of violating the Act.

The Virginia statutes define bribery as corruptly giving, offering or promising a gift to an official, and as the acceptance of such gift by an official. Virginia Code, §18.1-278 and 279 (Appendix B, p. 42).

It is petitioner's contention, and the dissenting judge below agrees, that the only "unlawful activity" which is alleged or otherwise applicable to this case, namely, bribery, was complete under the Virginia statutes no later than September 9, 1961, and that when the Travel Act was passed on September 13 there was no "bribery. . . . in violation of the laws of the State" for the Act to attach to.

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[3] At the trial the defense was that the payment to Somers was a legitimate fee to a zoning attorney.

After the Travel Act was enacted the rezoning of July 26, 1961 was set aside by the courts, a new zoning application was filed, some letters were written (but none by petitioner) in support of this second application, and the second application was granted on July 25, 1962. No payment was ever made, however, after August 1961 or, at the latest, after September 9, 1961 with the payment to Cotten.

The depositing of Cotten's check on September 15, 1961, the events surrounding the granting of the second application for rezoning on July 25, 1962, and a letter written by one defendant on June 17, 1962 (C. A. 467) in support of the second rezoning application are listed as overt acts in the indictment.

The trial court instructed the jury that the "unlawful activity" alleged in the indictment[4] was obtaining a zoning in Fairfax County via bribery (C.A. 369)[5] rather than bribery itself, thus giving a continuing existence to an "unlawful activity" which was already complete.[6] This instruction was crucial to the conviction, and enabled the prosecution to overcome petitioner's contention that the Travel Act was *ex post facto* to any "unlawful activity" to which it could attach.

Having preserved this point,[7] petitioner and the others appealed. The Court of Appeals for the Fourth Circuit affirmed, holding in a two-to-one decision on February 5, 1968 (Appendix A, p. 24) that the appellants relied too heavily on state law, which served only as a "background

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[4]This is necessarily the same "unlawful activity" that is referred to in the Travel Act.

[5]"C.A." refers to the consolidated appendix printed for use of the court below.

[6]The instruction would have been more to the point had the alleged "unlawful activity" been a *business* (i.e. a continuing entity) as defined in 18 U.S.C. 1952(b)(1).

[7]The point was preserved by written motion to dismiss (C.A. 20, 42), by requests for instructions (C.A. 70, 358-361, 369, 388), and by a motion for new trial and in arrest of judgment (C.A. 395).

identification" for their unlawful activities; that although the state law of bribery was violated and the crime was "*complete*" when the money passed, nevertheless the crime was not "complete*d*" because the rezoning activity continued. "Thus, the *federal* crime continued until the rezoning was accomplished on July 25, 1962" (*United States v. Wechsler*, 392 F.2d 344, 347, emphasis in original). The affirmance thus appears to rest on a distinction between "complete" and "completed".

The Court of Appeals also held that Cotten's deposit of the check on September 15, 1961 constituted a use of interstate commerce, apparently because the check had to cross a state line on its way from Cotten's bank back to Leigh's bank. It also stated that the other overt acts furthered the conspiracy and followed the enactment of the Travel Act.

Judge Winter dissented from the decision of the other two judges of the Fourth Circuit. Petitioner filed a petition for rehearing en banc but this was denied on March 7, 1968, and there followed two unsuccessful petitions to this Court.

The decision in *United States v. Nardello*, 393 U.S. 286 (Jan. 13, 1969) appears to invalidate the Fourth Circuit's decision of February 5, 1968. *Nardello* holds that while "extortion . . . in violation of the laws of the state," as used in the Travel Act, is not limited to state laws which are labelled "extortion," nevertheless the activity complained of (1) must be prohibited by state law and (2) must be classified as extortionate. The Government argued and the Court twice clearly stated in the *Nardello* opinion that the unlawful activity in question must violate state law, thus negating any idea that a federal crime can continue after a state crime is complete.

Petitioner thereupon filed with the Fourth Circuit Court of Appeals, on January 18, 1969, a Motion to Recall Mandates and For Reconsideration or, Alternatively, For Leave to File Second Petition for Rehearing. The Court granted

leave to file a Second Petition for Rehearing on January 28, 1969 and it invited the Government to respond (Appendix A, p. 23). Following the filing of the Petition for Rehearing, the Government's Response, and the petitioner's Reply, the Fourth Circuit decided on April 8, 1969, again in a two-to-one decision, to adhere to its prior decision of February 5, 1968 in petitioner's case. The Court of Appeals used three reasons to uphold its first decision. They are:

1. It stated that it is "not at all clear" that if zoning officals should receive bribes outside the state and then give their *quid pro quo* after returning to the state their later activity would be beyond the reach of Virginia's bribery statute.

2. It argued that *Nardello* rejects careful distinctions and looks at the elements of state crime generically. There followed an *ipsi dixit* that Virginia law prohibits the activity in this case.

3. It noted in a footnote that "Cotten's bribe was deposited in his account two days after enactment of the Travel Act."

None of the court's reasons is valid.

REASONS FOR GRANTING THE WRIT

1. The court below interpreted the Travel Act in a manner which is in conflict with *United States v. Nardello*.

The Travel Act provides to the extent applicable to this case that whoever uses interstate facilities with intent to promote bribery under Virginia law and thereafter performs an act to promote such bribery is guilty of a felony.

Nardello makes it clear that a state bribery law must be violated, that is, that the Travel Act must have a state bribery statute violation to attach to.

The court below shifted its position after *Nardello* was decided. It had to, because it could no longer say that the state statute served only for "background identification" or

that "the *federal* crime continued" *United States v. Wechsler*, 392 F.2d 344, 347, emphasis in original). *Nardello* makes it clear that the activity in question must be prohibited by state law. The court below now says that the activity in this case does violate state law. The only applicable state law is found in the Virginia bribery statutes (Virginia Code §§ 18.1-278 and 279). The Court of Appeals, however, does not say when the unlawful activity must take place. Thus it fails to come to grips with petitioner's contention that if the unlawful activity is complete before September 13, 1961 there can be no violation of the Travel Act because the *ex post facto* clause prevents it. Only if the bribery was not complete, in the sense that the "unlawful activity," bribery, continued until the final rezoning (or until any time after September 13, 1961) would the state law and *ipso facto* the federal law be violated.

Ford v. Commonwealth, 177 Va. 889, 15 S.E.2d 50 (1941) shows that the alleged unlawful activity in this case, bribery, occurred and was complete[8] before the Travel Act was passed. In that case the defendant was indicted for offering a constable $6 a week for "protection" in her whiskey-selling operation. The Virginia bribery statute was substantially the same then as now. The court said that the statute "prohibits three specific acts—the giving of a bribe, the offer of a bribe, and the promise of a bribe, *any one of which is a complete crime in itself*" (emphasis supplied). The court noted that the offense occurred whether the influence was "to be exerted as to a pending crime or to a crime to be committed in the future."

Ford says that the crime is complete and can be prosecuted when the bribe is given (which in the present case was prior to September 13, 1961). The holding is clear

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[8]There is no significant difference between "complete" and "completed" despite the first opinion of the court below, *Wechsler v. United States*, 392 F.2d 344, 347. In *Pendergast v. United States*, 317 U.S. 412, 418 (1943), this Court said, "Statutes of limitations normally begin to run when the crime is complete."

that nothing that happens thereafter makes the crime more complete. Subsequent events do not add to the crime. They may be admissible, in the sense that post-crime flight, or change of name, or change of appearance may be admissible, but they are not part of the crime. Thus there is an apparent conflict between the opinion below and *Ford* and by the same token, between the opinion below and *Nardello*.

Cases from other jurisdictions point up this conflict. In *State v. Bloomenstiel*, 235 La. 860, 106 So.2d 288 (1958), a member of the Pontchartrain Levee Board was charged with accepting a bribe in St. James Parish, Louisiana. It was stipulated that nothing of value was ever given or accepted in St. James Parish, and so the District Judge sustained a motion to quash for lack of jurisdiction. The Supreme Court of Louisiana affirmed. The State argued that the domicile of the Levee Board was fixed by statute in St. James Parish and that therefore the place where the board member would give his *quid pro quo* was St. James Parish. The State Supreme Court rejected this:

> "The unmistakable object of the Act is to guard against the corruption of the mind of the officer . . . and hence the first step is made criminal, without looking or waiting for results. This step, the accepting of a bribe as charged, was not committed in the Parish of St. James. This step was taken, it began and effectively completed the crime in some parish other than St. James, and without any relation to what might thereafter occur in said parish. . . . Our conclusion is that the act of bribery was completed when there was a giving and acceptance of money or a thing of value under a corrupt agreement. These acts having been committed beyond the territorial limits of the Parish of St. James, the District Court of said parish was without jurisdiction."

An identical result was obtained and almost identical language was used by the Supreme Court of Ohio in *State v. Knight*, 54 Ohio St. 330, 43 N.E. 281 (1896).

The defendants, Commissioners of Wood County, were indicted therein for soliciting a bribe in Summit County to influence their official action in Wood County. The State urged that as the acts of the defendants had to be performed in Wood County, that the legal effect would take place there, and that the injury would be to the people of Wood County. The court held however, that "the first step was taken in Summit County, and such step began and completed the crime, without any relation to what might occur thereafter in Wood County . . . ." (Emphasis supplied).

Thus the Supreme Courts of Louisiana and Ohio have articulated clearly what the Supreme Court of Appeals of Virginia decided in *Ford*.

The Travel Act defines "unlawful activity" as including "extortion, bribery, or arson in violation of the laws of the State in which committed." An arson analogy may be helpful, because the time when arson is committed and completed is easier to visualize than the time when bribery is committed and completed. When a person is charged with arson of his own home, his motive, as shown by a subsequent demand on his insurance company, is admissible but the crime of arson is complete with the burning. The demand on the insurance company does not extend the crime. This is true even where the charge is arson with intent to injure an insured (see Virginia Code, § 18.1-85). The crime is complete with the burning accompanied by the intent to injure. The demand on the insurance company does not extend it. So here, the crime is complete with the payment of the money; the subsequent activity with respect to the second zoning application does not extend it.

A case in point is *Yates v. United States*, 354 U.S. 298 (1957). This case involved a 1951 prosecution under the Smith Act for a conspiracy to "organize" the Communist Party as a society of persons to advocate and teach the overthrow of the United States Government by violence. The alleged conspiracy extended over a period from 1940

to 1951. The Communist Party came into being in 1945, and a three-year statute of limitations was in effect. The question was whether "organize" should be applied in its narrow sense of "establish" or whether it connoted a continuing process which lasted throughout the life of the organization and included such things as the regrouping of existing clubs, the forming of new clubs, and the recruiting of new members. The Supreme Court, in reversing the conviction, held that "organize" would have to be construed in its narrow sense; that there was no continuing aspect of an organizational process; and that the statute of limitations expired three years after the Communist Party came into being in 1945. So here, there is no continuing aspect to bribery. It is completed once the money changes hands.

In *United States v. Hood,* 343 U.S. 148 (1952) the defendant was indicted under a federal law which prohibited the soliciting of money in return for a promise to use influence in federal appointments. The indictment alleged that the defendant promised to use his influence in obtaining appointments to certain federal offices but it was stipulated that at the time of the solicitation and thereafter those offices did not exist. The district court dismissed the indictment but the Supreme Court reversed, holding that the statute was violated at the time of the solicitation of the bribe, regardless of whether the promise to use influence could ever be fulfilled. "There is no indication that this statute punishes delivery of the fruit of the forbidden transaction—it forbids the sale. The sale is what is here alleged. Whether the corrupt transaction would or could ever be performed is immaterial."

2. The decision below creates uncertainty in the administration of justice and in the future interpretation of the Travel Act.

(a) The decision makes the Travel Act applicable in Virginia when, on the same facts save situs, it would not be applicable in other states.

Under *Bloomenstiel, supra,* the Travel Act would not be applicable in Louisiana to the same facts as exist in the present case. The Louisiana Supreme Court makes it clear that whatever happens after the alleged bribe is given and received is not a part of the offense. The present case therefore could not have been prosecuted in Louisiana if all of the facts, save situs, were identical. Neither could it have been prosecuted in Ohio. *State v. Knight,* 43 N.E. 281, 54 Ohio St. 330 (1896).

The *Bloomenstiel* doctrine appears to be the general law. *People v. Willis,* 24 Misc. 549, 54 N.Y.S. 52 (1898) ("The crime was complete when the corrupt agreement was consummated, and the allegations of the subsequent acts of the defendant . . . . . were unnecessary"); *Curtis v. State,* 113 Ohio St. 187, 148 N.E. 834 (1925) (". . . . the offense is complete upon the payment of the money, if the object of its offering and payment is to influence the official in performance of his duties, and it is immaterial that he fails to carry out his part of the compact or that he has had no opportunity to do so"); *Wallace v. State* (Del. 1965), 211 A.2d 845 ("Nor is it necessary that any improper act on the part of the officer should follow. It is enough if he corruptly agrees to open himself to improper influence."); *State v. Begyn,* 34 N.J. 35, 167 A.2d 161 (1960) (". . . . it makes no difference whether the official action bargained for thereafter actually takes place."); *State v. Harrah,* 101 W. Va. 300, 132 S.E. 654 (1926) ("The corrupt taking or receiving by a juror of money or other things of value constitutes the crime of bribery . . . . . therefore the county in which this act takes place [rather than where the quid pro quo is given by the juror] is the venue of the crime, and should be so alleged").

For federal cases to the same effect see *United States v. Hood,* 343 U.S. 148 (1952); *Howard v. United States,* 345 F.2d 126, 128 (1st Cir. 1965); *Wilson v. United States,* 230 F.2d 521, 526 (4th Cir. 1956); *Stephens v. United States,* 347 F.2d 722, 724 (5th Cir. 1965), and *Wolff v. United States,* 292 F. 673, 675 (6th Cir. 1923).

Nardello shows that there is "no reason why Congress would wish to have § 1952 aid local law enforcement efforts in Utah but to deny that aid to Pennsylvania when both States have statutes covering the same offense." Yet the decision below would do that, at least as between Virginia and Louisiana, as between Virginia and Ohio, and presumably as between Virginia and the other States.

The court below attempts to give some continuing effect to the Virginia bribery law by saying "We think it not at all clear that if these corrupt zoning officials had received their bribes in the District of Columbia, for example, that their subsequent activity in Virginia to procure rezoning would be beyond the reach of Virginia's bribery statute." The difficulty with this argument is that it is entirely clear that the Virginia statutes cover the illustration given, because both §§ 18.1-278 and 279 of the Virginia Code apply *in haec verba* to a Virginia resident who leaves the State, gives or receives a bribe while outside the state and then returns to the State. Under the Code, the offense described by the Circuit Court is complete upon the return to the State (not upon the subsequent giving of the *quid pro quo*) and, where the resident does not leave the State, the offense is complete upon the giving and acceptance of the bribe. There would be no reason for the "Virginia resident" language of the Code if the giving of the *quid pro quo* were a part of the crime, as the majority below seems to hold.

In 1968 Virginia enacted an additional bribery statute (Code § 18.1-282.1 to 282.4) covering bribery of public servants, party officials and voters. The new statute preserves the concept that the crime is complete when a bribe is offered, given or accepted, and the concept of a Virginian returning to the state after a temporary absence.

The court below also points out in a footnote that Cotten's check was not deposited by him until September 15, 1961, two days after the Travel Act was passed. His check, however, was dated and presumably given to him on September 9, 1961, four days before the Travel Act was

passed. September 9, 1961 then, rather than September 15, 1961, becomes the critical date, for the giving of a check is the giving of a thing of value. 12 Am. Jur. 2d, Bribery §7, at pp. 752-753; *Commonwealth v. Donovan,* 170 Mass. 228, 49 N.E. 104, 108-109 (1898); see also *Zalla v. State,* 61 So.2d 649 (Fla. 1952); *People v. Hyde,* 156 App. Div. 618, 623 (1st Dept. 1913); *State v. Vallee,* 136 Me. 432, 12 A.2d 421 (1940); *Scott v. State,* 107 Ohio St. 475, 141 N.E. 19 (1923); *Osborne v. State,* 160 Tenn. 594, 28 S.W.2d 47, 48 (1930); *State v. Brown,* 364 Mo. 759, 267 S.W.2d 682 (1954).

If by the reference to the Cotten check the court below is pointing out that the mails would be involved in the transmission of the check from Cotten's bank to Leigh's bank, the argument flies in the face of *Kann v. United States,* 323 U.S. 88 (1944) and *Parr v. United States,* 363 U.S. 370 (1960). See also *Carroll v. United States,* 326 F.2d 72 (9th Cir. 1963).

(b) The opinion of the court below misconstrues the Travel Act and creates a federal crime where none exists under the Act.

The Travel Act by its terms must attach itself to a state crime. If there is no applicable state crime there is no violation of the Travel Act. There is no applicable state crime where the state crime has been completed, because such a completed crime cannot be promoted, managed, established or carried on. The giving of the official's *quid pro quo* is not a part of bribery.

(c) The decision below creates uncertainty as to the time when the federal statute of limitations (18 U.S.C. 3282) begins to run.

The decision of the court below necessarily causes uncertainties in the interpretation and application of the Travel Act. Will, for instance, the federal statute of limitations run from the completion of the state crime of extortion, bribery or arson, or will it run from an act, perhaps five years later, which has some relation to the crime? In the arson analogy already given, will the statute run from the date of

the fire or from the time when the insured receives his check in the mails? Or perhaps from the time when the insured's bank sends the check back to the insurer's bank?

3. Since the Travel Act incorporates a state criminal statute, and since the state crime involved in the case was complete before the enactment of the Travel Act, that Act is ex post facto the offense, and the error below becomes constitutional.

It has long since been decided that a statute is *ex post facto* if it "makes an action done before the passing of the law, and which was innocent when done, criminal", *Calder v. Bull,* 3 Dall. 386, 390, 1 L.Ed. 648 (1798). Now, the Travel Acts proscribes, but only after September 13, 1961, (1) the use of an interstate facility with intent to promote, manage, establish, or carry on bribery under Virginia law plus (2) the later performance of an act to promote, marage, establish, or carry on such bribery.

As applied to the single act of bribery proscribed by § 1952(b)(2), the phrase "promote, manage, establish, carry on or facilitate such promotion, management, establishment or carrying on" as used in § 1952(a)(3), means to originate, direct, advance or facilitate any such act of bribery. The indictment specifically uses the phrase "establishing and carrying on", which in normal usage means to originate and advance. Webster's New International Dictionary (2d Ed. 1961) defines "establish" as meaning "to originate and secure the permanent existence of." See also, *Old Kent Bank & Trust Co. v. Martin,* 281 F.2d 61, 62 (C.A.D.C. 1960); *Pennsylvania R.R. Co. v. Erie Avenue Warehouse Co.,* 193 F.Supp. 471, 478 (E.D. Pa. (1961)). Webster defines "carry on" as meaning "* * * to advance, or help forward, continue * * * keep up; as, to carry on a design." See also, *Cooper's Mfg. Co. v. Ferguson,* 113 U.S. 727, 735-736 (1885). "It was the single act of [bribery] (not necessarily a continued course of [bribery]) *which had been accomplished and facilitated* by interstate travel that the second subsection of § 1952(b) sought to prevent and punish."

Marshall v. United States, 355 F.2d 999, 1003 (C.A. 9, 1966) (emphasis supplied). Since the bribe is complete under both Virginia and Federal law when it is given or accepted, notwithstanding that the official act in consideration therefor is to occur in the future, *Ford v. Commonwealth*, 177 Va. 889, 15 S.E.2d 50, 52-53 (1941); *United States v. Hood*, 343 U.S. 148, 150-151 (1952), the "carrying on" of the bribe must mean those acts leading up to the giving or acceptance of the bribe, not acts subsequent thereto.

4. Since the district court instructed the jury that the "unlawful activity" under the Travel Act was "obtaining a rezoning via bribery" (C.A. 369) and since it refused to charge that if the jury should find that any bribery was completed before September 13, 1961, it should acquit (C.A. 70, 358 to 361), *Nardello* requires a new trial.

The district court instructed the jury that the defendants were charged with violating the Travel Act, that is, that they conspired to use interstate commerce facilities to carry on unlawful activity, which was obtaining a zoning via bribery (C.A. 369). It refused to charge that the unlawful activity was bribery itself (C.A. 358-360). It further instructed the jury that if there was a conspiracy and if its object was to use interstate commerce facilities for the purpose of carrying on or aiding or obtaining a zoning by bribery, that would be a violation of the Virginia statutes (C.A. 369). The court refused an instruction based on the date of September 13, 1961 (C.A. 70, 358, 361) and omitted any reference to the time element in its charge (C.A. 363-387).

Nardello makes it clear that the unlawful activity is bribery in violation of a state statute, not the obtaining of a zoning by means of bribery completed before the Travel Act was passed. The case should at least be remanded for a new trial with the instructions that the jury should acquit if it should find that any bribe was completed before September 13, 1961, for the jury may have convicted petitioner on the basis of the instruction upheld by the first decision below, which has been deprived of its validity by *Nardello*.

CONCLUSION

United States v. Nardello, 393 U.S. 286 (1969), invalidates the decision of the Court of Appeals. The latter decision, if allowed to stand, will create uncertainties in the administration of the Travel Act and will make the Act, on the same facts and under similar statutes, applicable in some states and not in others.

The decision of the Court of Appeals gives the Travel Act an interpretation which violates the *ex post facto* clause. While the importance of an *ex post facto* error diminishes as time passes, the error is still constitutional and thus merits this Court's attention.

In any event, the error below shows that the petitioner was convicted on erroneous instructions, and the case therefore calls for a new trial.

For all of the above, the Petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 11,331

UNITED STATES OF AMERICA
Appellee,

v.

NATHAN WECHSLER
Appellant

Appeals from the United States District Court for the Eastern District of Virginia, at Alexandria.
Oren R. Lewis, District Judge.

(Decided April 8, 1969)

Before HAYNSWORTH, Chief Judge, and WINTER and CRAVEN, Circuit Judges.

ORDER

PER CURIAM:

A divided panel of this court affirmed the convictions of these defendants under 18 U.S.C. §371, 1952, on February 5, 1968. On March 7, 1968, the court denied a petition for rehearing en banc by a vote of five to one, with one judge

abstaining. Subsequently, the original panel unanimously affirmed denial of a motion for a new trial lodged in the district court. Recently the same panel authorized the filing of a second petition for rehearing based upon the decision of the United States Supreme Court in *United States v. Nardello*, ___ U.S. ___, 37 L.W. 4073 (Jan. 13, 1969). In response to our invitation, the appellants and the United States have submitted briefs and we have carefully considered them. After consultation with non-panel members of the court, we now reject the second petition for rehearing.

We do not read *Nardello* as undercutting our prior decision. The issue that divided us before was that of the duration of bribery admittedly prohibited by the State of Virginia—whether it extended to that point in time at which the zoning corruption was accomplished. We thought that it did despite language in the Virginia cases that the crime of bribery is complete when the bribe is paid.[1] Doubtless in Virginia an indictment need not charge that the briber got his *quid pro quo*, but it does not follow that the Supreme Court of Appeals of Virginia would adopt the same language in construing its statute if the payment and receipt of the money were beyond the jurisdiction. We think it not at all clear that if these corrupt zoning officials had received their bribes in the District of Columbia, for example, that their subsequent activity in Virginia to procure rezoning would be beyond the reach of Virginia's bribery statute. Code § 18.1-278 specifically says this. So does. 279. The Va. Code specifically provides for this, but by implication rules out our conduct.

Nardello,[2] *supra*, displays, we think, some degree of impatience with fine lines, careful distinctions and labels.

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[1] We noted that Cotten's bribe was deposited in his account two days after enactment of the Travel Act. 392 F.2d 344, 347.

[2] The Supreme Court noted probable jurisdiction in *Nardello* on June 17, 1968, the same date on which it denied certiorari in this case.

It rejects the contention that "peculiar versions of state terminology are controlling," and looks at the elements of state crime generically. The question is said to be "whether the particular state involved prohibits the extortionate activity charged." We do not doubt that Virginia does. It is made plain that the term "extortion" as used in the Travel Act was not intended to track closely the legal understanding under the state law labelled extortion. It is enough that the corrupt activity of the appellants in procuring rezoning was illegal under Virginia law.

The petition for rehearing is

DENIED.

WINTER, Circuit Judge, dissenting:

In dissenting from the affirmance of the judgments of conviction, I was of the view that 18 U.S.C.A. § 1952 was inapplicable because the state crime of bribery had been completed before the use of facilities in interstate commerce to accomplish an unlawful state purpose was made illegal. It followed, so I thought, that the majority's view gave unconstitutional retrospective effect to the federal statute and tortured the meaning of the federal statute by holding illegal the use of facilities in interstate commerce unaccompanied by any intent to violate state law. *United States v. Wechsler,* 392 F.2d 344, 349-354 (4th Cir. 1968).

United States v. Nardello, ___ U.S. ___, 21 L.Ed 487 (1969), only confirms my view. It is replete with references to the concept that the federal act was intended to aid state law enforcement authorities *in the enforcement of state law.* In performing this supplementary purpose, the federal act cannot apply where state law is inapplicable. Where the state crime is complete, subsequent use of interstate facilities is not made illegal under federal law.

To avoid the plain thrust of *Nardello,* the majority significantly shifts the basis of its prior decision. In speaking originally, the majority said:

> "We have no doubt that when the money passed, if not before, the state law of bribery had been violated and that appellants could then have been indicted in the state courts; in that sense their crime was *complete*. But their crime was not yet completed. * * * The manifest purpose of the statute is to deny the use of facilities in interstate commerce to those who would effect a wrong on the people by corrupting public officials. The wrong was not done to the people until the rezoning was accomplished and the accomplishment of that wrong, after the use of a facility in interstate commerce, is one of the activities at which the statute is aimed. Thus, the *federal* crime continued until the rezoning was accomplished on July 25, 1962." 392 F.2d 346-347 (emphasis in original).

Now the majority seeks to explain its prior holding by the statement:

> "The issue that divided us before was that of the duration of bribery admittedly prohibited by the State of Virginia—whether it extended to that point in time at which the zoning corruption was accomplished. We thought it did despite the language in the Virginia cases that the crime of bribery is complete when the bribe is paid. Doubtless in Virginia an indictment need not charge that the briber got his *quid pro quo*, but it does not follow that the Supreme Court of Appeals of Virginia would adopt the same language in construing its statute if the payment and receipt of the money were beyond that jurisdiction. We think it not at all clear that if these corrupt zoning officials had received their bribes in the District of Columbia, for example, that their subsequent activity in Virginia to procure rezoning would be beyond the reach of Virginia's bribery statute." (footnote eliminated.)

That initially the majority purported to rely on federal law even though it now claims that it relied on state law, and that its opinions are thus mutually contradictory are manifest.

Two other comments are in order. First, for its initial statement the majority relied heavily on an authority which no longer exists. See, present opinion in *United States v. Wingo*, 394 F.2d 484 (6th Cir. 1968). Second, in its latest expression, the majority need not speculate what the Supreme Court of Appeals of Virginia may hold with regard to corrupt public officials who receive bribes outside of the State of Virginia and then return. In such instances, the Virginia statutes make the promise, offer or gift of a bribe, as well as acceptance of the bribe, a criminal act, without more. 4 *Code of Virginia* (1960 Repl. Vol.) §§ 18.1-278; 18.1-279. The holding should be clear. This is no indication, however, that Virginia would treat as proscribed conduct acts occurring after payment of the bribe. To the contrary, *Ford v. Commonwealth*, 15 S.E.2d 50, 52 (Va. 1941), tells us "[i]t [the statute] prohibits three specific acts—the giving of a bribe, the offer of a bribe and the promise of a bribe, any one of which is a complete crime in itself." Certainly, there is no warrant for concluding that that Virginia law extended to the rezoning, so as to carry with it the federal law, as to these defendants.

For the reasons I originally stated and on the authority of *Nardello*, I dissent from the denial of the petition for rehearing.

[Caption omitted in printing]

[Filed January 28, 1969]

Upon consideration of the Motion of the Appelants and after consultation with the other members of the panel,

It is now ordered that leave be and it hereby is granted to the Appellants to file a second petition for rehearing, out of time, and the United States is invited to file promptly a response.

/s/ Clement F. Haynsworth, Jr.
Chief Judge, Fourth Circuit

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Nos. 11,331, *et al.*

UNITED STATES OF AMERICA, *Appellee,*

v.

NATHAN WECHSLER, GEORGE FAIGEN, SEYMOUR FAIGEN, ROBERT C. COTTEN, JR., SIGMUND GOLBLATT, and A. CLAIBORNE LEIGH, *Appellants.*

Appeals from the United States District Court for the Eastern District of Virginia, at Alexandria.
Oren R. Lewis, District Judge.

(Argued November 7, 1967. Decided February 5, 1968.)

Before Haynsworth, Chief Judge, and Winter and Craven, Circuit Judges.

CRAVEN, Circuit Judge:

Involved here is a scheme by certain partners in a real estate development company (Nathan Wechsler, Sigmund Goldblatt, George Faigen, and Seymour Faigen) to bribe two members of the Board of Supervisors of Fairfax County, Virginia, (Robert Cotten and Claiborne Leigh) to vote for the re-zoning of land in which the partnership was interested. Goldblatt, Cotten, Leigh and George Faigen appeal from their convictions for substantively violating 18 U.S.C.A. § 1952(a)(3) and for conspiring to violate the same statute; Wechsler and Seymour Faigen were acquitted on the substantive count and appeal from their convictions on the conspiracy count. The central question presented is whether the offense of using a facility in inter-

state commerce to promote, manage, establish, or carry on bribery and thereafter performing an act to promote, manage, establish, or carry on bribery is to be equated with, and limited by, the state law of bribery. We think not and affirm the convictions of all appellants.

In 1960, the developer-defendants were interested in procuring a zoning change from residential to mobile homes for 84.3 acres of land in Fairfax County which they wanted to use as a trailer park. Sufficient evidence was introduced at trial for the jury to find the following facts. On March 9, 1960, George Faigen filed an application for the re-zoning. A year later, but before the Board of Supervisors had acted upon the application, the four defendant-partners placed a check for $5,500 in escrow in the Security Bank of Washington for John C. Somers, an attorney who often handled zoning cases in Fairfax County on a contingent fee basis, conditioned upon favorable action by the Board. Two months later, on July 26, 1961, the Board acted favorably on Faigen's application on the affirmative votes of Leigh, Cotten, DeBell [1] and another. On August 7, the developer-defendants instructed the Security Bank to release the $5,500 check to Somers who deposited it to his own account on August 18, the day on which he was notified by the bank. Somers was instructed by Leigh to run the check through his own account and then make out a check for the same amount to Leigh, and did so. Somers had performed no work for developer defendants at any time, and in 1961 he knew none of them except Goldblatt.[2] Leigh deposited the check to his account on August 19, and on August 22 he wrote a check to DeBell for $1,308.33; on August 23, he wrote a check to himself for $1,333;

[1] Acquitted below.

[2] Somers also testified that he had not reported the check as income on his 1961 tax return and that he had invoked the Fifth Amendment six times before the Grand Jury after which he had been given immunity.

and on September 9, he wrote a check to Cotten for $1,000. Cotten's secretary entered the $1,000 check as a legal fee in Cotten's checkbook and receipts book and deposited the check to Cotten's account on September 15. On September 13, 1961, Congress enacted 18 U.S.C. § 1952. Because the state courts of Virginia set aside the original Board action, it was necessary for George Faigen to file a new application on June 20, 1962. This second application was considered by the Board on July 25, 1962, and again it was approved, this time on the affirmative votes of Cotten, Leigh, DeBell, and two others. Three letters, two by Goldblatt and one by George Faigen, connected with the effort to procure the re-zoning were mailed on June 17 and 18 and on July 21, 1962.

The most serious argument advanced by the appellants, and the one on which most of their other arguments depend, is that their crime was complete before the statute was enacted. We disagree. Their theory is that under Virginia law the crime of bribery is complete upon the giving, offering, or promising of a bribe even though the official act to be done in consideration therefore is to occur in futuro. The fallacy in their argument lies in a too heavy reliance on state law. The state crime serves "only as a background identification of the unlawful activities." *United States* v. *Wingo*, ... F.2d ... (6th Cir. 1967) *United States* v. *Kubacki*, 237 F. Supp. 638, 643 (E.D. Pa. 1965). We have no doubt that when the money passed, if not before, the state law of bribery had been violated and that appellants could then have been indicted in the state courts; in that sense their crime was *complete*. But, their crime was not yet complet*ed*. Their activities continued beyond that point and indeed, beyond the date on which the statute was enacted. The manifest purpose of the statute is to deny the use of facilities in interstate commerce to those who would effect a wrong on the people by corrupting public officials. The wrong was not done to the people until the re-zoning was accomplished and the accomplish-

ment of that wrong, after the use of a facility in interstate commerce, is one of the activities at which the statute is aimed. Thus, the *federal* crime continued until the re-zoning was accomplished on July 25, 1962.

The statute was enacted on September 13, 1961; on September 15, Cotten caused the check from Leigh to be deposited in his bank account, and the jury could have found that this check was in payment for Cotten's vote. Depositing that check in a bank for collection was the use of a "facility in interstate or foreign commerce."[3] On July 25, 1962, Cotten voted in favor of the re-zoning. Thus, he used a facility in interstate commerce to facilitate the carrying on of bribery and *thereafter* performed the carrying on of bribery, squarely within the terms of the statute, after the statute was enacted. As applied to Cotten, then, the statute had no ex post facto effect.

By the same token, the conspiracy convictions of each of the appellants must be affirmed. Appellants argue that a new trial is necessitated by the trial judge's instruction that the jury could convict if one of the conspirators com-

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[3] When one deposits a check, there would seem to be little doubt that he is using a facility in interstate commerce. Banks have often been held to be involved in interstate commerce for other purposes. *E.g., NLRB* v. *Bank of America*, 130 F. 2d 624 (9th Cir. 1942) (National Labor Relations Act); *Lorenzetti* v. *American Trust Co.*, 45 F. Supp. 128 (N.D. Cal. 1942) (Fair Labor Standards Act). Moreover, Government Exhibit No. 12, the check from Leigh to Cotten, shows that the check was drawn on a Virginia bank and bears the endorsement of a Washington, D.C. bank. Nor do we doubt that the evidence was sufficient for the jury to find the requisite statutory intent. *See; United States* v. *Wingo*, — F. 2d — (6th Cir. 1967). To paraphrase our holding in an analagous situation, there must be some connection between the unlawful activity and the use of a facility in interstate commerce, but "we think it sufficient under section 1952 that the defendant knowingly caused to be transmitted interstate . . . proceeds of a [bribery] which was unlawful under the [Virginia] statute." *United States* v. *Hawthorne*, 356 F. 2d 740, 742 (4th Cir. 1966).

mitted any of the several overt acts charged in the indictment, several of which were not acts in furtherance of *bribery* and occurred, under appellants' theory, after the conspiracy had ended. But in order to have convicted Cotten of the substantive offense, the jury must have found that he deposited his check from Leigh, and this was one of the overt acts to which the trial judge referred. Each member of the conspiracy is chargeable with acts performed by other members in furtherance of the conspiracy. *Pinkerton* v. *United States,* 328 U.S. 640 (1946).[4] Further, appellants were not charged with a conspiracy to commit *bribery,* but with a conspiracy to violate 18 U.S.C. § 1952.[5] Each of the overt acts listed in the indictment were acts which would have furthered this conspiracy and each was performed after the statute was enacted and before the conspiracy ended, according to our holding, on July 25, 1962, when the Board acted affirmatively on the re-zoning application.

On the other hand, rather serious problems are raised in connection with the substantive convictions of each of the appellants other than Cotten. But because we affirm their conspiracy convictions and because the sentences on each

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[4] Since Seymour Faigen has been acquitted of the substantive count and since the punishment of the other appellants would not be affected, we decline to consider whether Cotten's commission of the substantive offense was in furtherance of the conspiracy so as to make all conspirators equally liable for the substantive offense as well as the conspiracy. *See, Pinkerton* v. *United States, id.* at 647; *United States* v. *McGuire,* 249 F. Supp. 43, 48 (S.D.N.Y. 1965).

[5] Appellants seriously urge that at the outset the trial judge construed Count I of the indictment to mean that they were charged with a conspiracy to commit bribery, and that later the theory was switched to read Count I as charging them with a conspiracy to procure a re-zoning by means of bribery. Since the indictment quite clearly charges a conspiracy to violate § 1952, such a switch, if indeed it occurred, would have entitled appellants to no more than a continuance on the grounds of surprise. No such motion was made.

count are to run concurrently, a reversal of the substantive convictions would be fruitless. We, thus, find it unnecessary to resolve those problems.[6] *Hirabayashi* v. *United States,* 320 U.S. 81, 85 (1943); *Gorin* v. *United States,* 312 U.S. 19, 33 (1941); *Brooks* v. *United States,* 267 U.S. 432, 441 (1925).

Many of the other arguments advanced by appellants are dependent upon the answer to the problem just discussed and, hence, fall with the statutory construction that we have adopted. However, there remain two arguments that merit brief mention. Appellant Leigh urges that it was error for the trial judge to require the defendants to agree on a trial location within the Eastern District of Virginia as a condition for fixing the place of trial somewhere within the district other than Alexandria under Fed. R. Crim. P. 18. But a motion for change of venue under Fed. R. Crim. P. 21(a) had already been denied; the condition was merely an attempt by the trial court to accommodate the defendants in keeping with the rule's mandate that the place of trial is to be fixed within

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[6] While we do not decide the question, we note that there is a serious question as to whether any of the appellants, other than Cotten, used a facility in interstate commerce and *thereafter* performed an act prohibited by the statute. Sigmund Goldblatt and George Faigen both wrote and mailed letters after the date of the statute, but it is seriously urged that the only act that they can be said to have performed *thereafter* is the appearance of Lytton Gibson, an attorney, before the Board of Supervisors on behalf of the partnership. Although traditional agency concepts might support the theory that Gibson's act was the act of each of the partners, ordinarily such an appearance is precisely the kind of activity in which, as the trial judge charged, any citizen has the right to engage; there is serious doubt that this act was shown to be one which was done to promote bribery. Conversely, Claiborne Leigh was shown to have performed an act after the statute was enacted (i.e., his vote), but it is doubtful that he was shown to have made use of a facility in interstate commerce before that act and after the effective date of the statute.

the district "with due regard to the convenience of the defendant and the witnesses."

Second, appellants contend that it was error for the trial judge to limit the testimony of William DeMik, an attorney. DeMik, on direct examination, testified that Wechsler had asked him about Somers, that he had investigated and had reported to Wechsler that Somers was an attorney who was extremely well connected with the Board of Supervisors. He was then asked if he had given Wechsler any advice; at that point the trial judge interrupted and *sua sponte* interposed an objection. The offer of proof was that DeMik would testify that he had advised Wechsler to settle with Somers thus supporting defendants' theory that the $5,500 had been put in escrow as settlement of a legal fee due to Somers. We find it unnecessary to decide if exclusion of this testimony was error, for we find no effect on the substantial rights of the parties within the meaning of 28 U.S.C.A. § 2111. Dobrow, the fifth partner, testified that Somers had been employed as an attorney to assist in the zoning, that a fee of $15,500 had been discussed, that Wechsler had been delegated by the partners to annul the preliminary arrangements after Gibson, another attorney retained to work on the same matter, had refused to work with Somers, and that a $5,500 settlement had been arranged with Somers. Further, another witness testified that he had told Wechsler, after investigating, that Somers was a person not without influence and that he was reasonably certain that Somers "could be somewhat harmful." There is, then, very little that DeMik's testimony could have added to the jury's knowledge. Moreover, the contentions of the defendants were carefully spelled out in the charge to the jury. In these circumstances, we can find no prejudice justifying a new trial. See, *Harper* v. *United States,* 143 F.2d 795, 806 (8th Cir. 1944).

We have carefully considered the other numerous arguments advanced on behalf of all applicants and find them to be without merit.

Affirmed.

WINTER, Circuit Judge, dissenting:

I agree wholeheartedly that one of the general purposes of Congress in the enactment of 18 U.S.C.A. § 1952 was "to deny the use of facilities in interstate commerce to those who would effect a wrong on the people by corrupting public officials." But in seeking to punish this class of wrongdoers, the government must be held to the exact class of transgressors whose activities Congress outlawed. To my mind, these defendants do not fall into this group.

The facts need not be extensively restated; only certain dates should be pointed up. The $5,500 bribe to accomplish favorable rezoning of the tract in question was removed from escrow and deposited to Somers' bank account on August 18, 1961. The next day it went into Leigh's bank account. From there, shares were disbursed to the three public officials who accomplished the rezoning. Specifically, one of them, Bell (who was acquitted at the trial) received a check in payment on August 22, 1961; Leigh, one of the others, made disbursement to himself on August 23, 1961; and the final payment was made to a third, Cotten, by check dated September 9, 1961. Cotten's bookkeeper did not deposit Cotten's check until September 15, 1961. Meanwhile, § 1952 became effective September 13, 1961. Because the initial rezoning was set aside by the courts, repetition of the rezoning, *but without the payment of any additional bribe,* took place in June and July, 1962. In connection with the second rezoning, the United States mails were used on June 17 and 18 and on July 21, 1962.

The statute, which was the basis of the substantive count of the indictment and the violation of which was the object of the alleged conspiracy in the conspiracy count of

the indictment, is set forth in the margin.[1] So far as pertinent here, the statute makes unlawful the conduct of one who uses any facility in interstate or foreign commerce, including the mail, *with intent to promote,* manage, establish, carry on, or facilitate the promotion, management, establishment or carrying on of *bribery in violation of the laws of the Commonwealth of Virginia* and thereafter performs or attempts to perform the crime of bribery in violation of those laws. The Virginia statutes defining the criminal conduct constituting bribery are likewise set forth

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[1] 18 U.S.C.A.

"§ 1952. Interstate and foreign travel or transportation in aid of racketeering enterprises.

(a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to—

(1) distribute the proceeds of any unlawful activity; or

(2) commit any crime of violence to further any unlawful activity; or

(3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,

and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3), shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

(b) As used in this section 'unlawful activity' means (1) any business enterprise involving gambling, liquor on which the Federal excise tax has not been paid, narcotics, or prostitution offenses in violation of the laws of the State in which they are committed or of the United States, or (2) extortion, bribery, or arson in violation of the laws of the State in which committed or of the United States.

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in the margin.[2] It is clear under Virginia law, as the majority tacitly concedes, that the latest point in time at which the crime of bribery is complete is *not* when the public

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[2] 4 Code of Virginia (1960 Repl. Vol.):

"§ 18.1-278. Bribes to officers or candidates for office.—If any person corruptly give, offer or promise to any executive, legislative or judicial officer, sheriff or police officer, or to any candidate for such office, either before or after he shall have taken his seat, any gift or gratuity, with intent to influence his act, vote, opinion, decision or judgment, on any matter, question, cause or proceeding, which is or may be then pending, or may by law come or be brought before him in his official capacity, he shall, upon conviction, be confined in the penitentiary not less than one nor more than ten years. This section shall also apply to a resident of this State who, while temporarily absent therefrom for that purpose, shall make such gift, offer or promise and thereafter return to this State.

* * * * "

"§ 18.1-279. Acceptance thereof by officer.—If any executive, legislative or judicial officer, sheriff or police officer, or any candidate for such office, accept in this State, or if, being resident in this State, such officer or candidate shall go out of this State and accept and afterwards return to and reside in this State, any gift or gratuity or any promise to make a gift or do any act beneficial to such officer or candidate under an agreement, or with an understanding, that his vote, opinion or judgment shall be given on any particular side of any question, cause or proceeding which is or may be by law brought before him in his official capacity or that in such capacity he shall make any particular nomination or appointment or take or fail to take any particular action or perform any duty required by law, he shall, upon conviction, be confined in the penitentiary not less than one nor more than ten years and shall forfeit his office and be forever incapable of holding any post mentioned in § 2-26. The word candidate as used in this and the preceding section shall mean anyone who offers himself or is put forward by others as a suitable person or an aspirant for such office."

official commits the act for which he is bribed, but when the bribe is given and the official accepts the bribe payment.[3]

The essential difference between me and the majority is that I think that the statute means what it says when it requires that the use of interstate facilities be accompanied by an intent to violate state law. Both *United States* v. *Wingo*, ... F.2d .... (6 Cir. 1967), and *United States* v. *Kubacki*, 237 F. S. 638 (E.D. Pa. 1965), support this position.[4] But in contravention of these authorities—and

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[3] Of course, the Virginia statute also permits a prosecution based on events which occur earlier than the completed transaction, i.e., the offer to give a bribe, and the agreement to accept one. *Ford* v. *Commonwealth*, 177 Va. 889, 15 S.E. 2d 50 (1940). For present purposes, however, my concern is properly directed only to the latest point in a complete transaction that criminality attaches.

[4] The "background identification" language in *Kubacki*, quoted in the majority opinion, must be placed in its proper context. It was not held in *Kubacki*, as the majority holds here, that it is unnecessary in determining whether § 1952 has been violated to examine the specific scope of the state law which the defendant is charged with having the intent to violate when using facilities of interstate commerce. To the contrary, an essential element of the holding in *Kubacki* is that under Pennsylvania law the crime of extortion is not completed until the actual payment is made, and that this payment was made after September 13, 1961. See 237 F. S. at 643 n. 7. The reasoning of the court was that although the public wrong effected by the extortion—the award of a parking meter contract—occurred before the effective date of § 1952, the illicit course of conduct under state law was not completed until the actual payment was made, and that, therefore, the use of facilities of interstate commerce after September 13 was made with the requisite intent to *violate state law*. Thus, the court stated:

> "Upon the adoption of § 1952 on September 13, 1961, the plan, contemplating as it did use of interstate facilities and interstate travel, became an unlawful conspiracy under federal law. Membership of the defendants in the theretofore federally innocent plan was then converted to membership in an unlawful conspiracy. *That conspiracy continued until the accom-*

the plain language of § 1952—the majority apparently deems that use of interstate facilities in the loose context

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plishment of the last of its objects, delivery of the money and the clock. *Id.*, at 643. (emphasis supplied)

The underscored language makes it clear that after the state crime of extortion had been completed by the making of the actual payment, the conspiracy to violate § 1952 must also necessarily terminate.

Similarly, *United States* v. *Wingo*, — F. 2d — (6 Cir. 1967), provides no support for the majority's approach of defining "unlawful activities" as used in § 1952 in federal terms, rather than according to state law. Indeed, in that case, which involved "travel in interstate commerce" to distribute the proceeds of prostitution, the Court explicitly recognized that "we are concerned by the terms of the statute [§ 1952] with an enterprise *unlawful under the laws of Tennessee.*" *Id.*, at —. And although the Court paraphrased the "background identification" language used in *Kubacki*, the context in which these words are used indicates that the Court meant something far different from what the majority suggests.

> "At this point it becomes necessary to determine what the Travel Act requires in the form of intent. Under § 1952, travel, with a requisite intent plus a subsequent act in furtherance of that intent, would be all that is required to make out a violation. *United States* v. *Bergland*, 318 F. 2d 159 (7 Cir. 1963) cert. den., *Cantrell, et al* v. *United States*, 375 U.S. 861 (1963). The state crimes serve only as a background identification of the unlawful activities *in aid of which the proscribed travel was undertaken.* *United States* v. *Kubacki*, 237 F. Supp. 639 (E.D. Pa., 1965). The words 'with intent' obviously refer to the words immediately following, namely 'to • • • distribute the proceeds of any unlawful activity.'" (emphasis supplied)

The difference in the "intent" required in *Wingo* and that required here is explained simply by the fact that the indictments in *Wingo* were brought under § 1952(a)(1), while the indictments in the instant case were brought under § 1952(a)(3). For present purposes, the critical aspect of the language in *Wingo* is that the Court considered that state law provides "background identification" to § 1952(a)(1) only in the sense that the gravamen of the federal offense is the use of interstate facilities with the intent to distribute the proceeds of an unlawful activity, *defined by state law.*

of some past violation of state law is sufficient, if subsequent conduct of the defendants can be said to violate the general purpose of § 1952 to protect the people from corruption of public officials.

The error of the majority is one of statutory interpretation, but as such it reaches constitutional magnitude. Under the operative facts as stated by the majority and repeated here, there can be no question (putting aside for the moment the check given to Cotten) but that the Virginia crimes of bribery and acceptance of a bribe were "complete and completed" prior to September 13, 1961—the effective date of § 1952. As will be later shown, the check given to Cotten requires no different conclusion. If the government had sought a conviction on the basis of the use of interstate facilities prior to September 13, 1961, so as to prove such use accompanied by the intent which § 1952 specifically requires, clearly the government would be seeking to give § 1952 retroactive application.[5] This the government could not do. U. S. Constitution, Art. I, § 9; *Bouie* v. *Columbia*, 378 U. S. 347 (1964). In allowing the government to circumvent this problem by reliance on uses of interstate facilities occurring after September 13, 1961, the majority has denied due process of law, because it has created by judicial fiat a federal crime not brought into existence by § 1952 itself, "the use of interstate facilities with intent to promote an illegal zoning." Such judicial enlargement of a penal statute, if applied retroactively, has the same effect as legislative enactment of an *ex post facto* law, which is constitutionally prohibited both to the states and to Congress (U. S. Constitution, Art. I, §§ 9 and 10), and has been held to violate the due process amendments. *Bouie* v. *Columbia, supra*. Because any use

[5] As particularized, the indictment charges that the use of interstate facilities by use of the United States mails between the Commonwealth of Virginia and Washington, D.C. occurred on or about September 20, 1961, October 11 and 12, 1961, October 22, 1961, November 28, 1961, and July 17 and 18, 1962.

of interstate facilities to promote an illegal zoning was federally innocent—even if it occurred after September 13, 1961—before the majority's decision in this case, the violation of due process follows.

Any doubt about the construction to be afforded § 1952 is allayed by reference to *Kann* v. *United States*, 323 U. S. 88 (1944), and *Parr* v. *United States*, 363 U. S. 370 (1960), both of which arose under the mail fraud statute. In *Kann* the defendants perpetrated a fraudulent scheme, pursuant to which they obtained checks payable to them, which they cashed or deposited at a bank. The use of the mails charged as a violation of the federal statute was the mailing of the checks for collection by the banks which cashed them to the banks on which they were drawn. Prior to that mailing, the defendants had obtained effective control over the money which they sought and, as far as they were concerned, their fraudulent plan had reached its fruition and come to a complete rest. The mailing was done by the banks, which had no connection whatsoever with the fraud. The checks were mailed for the bank's own purposes. On these facts it was held that the defendants could not be convicted for violation of the mail fraud statute, because the mailing did not occur with the requisite intent to defraud.

In *Parr* the defendants obtained gasoline and other products and services for themselves by the use of a credit card of a School District which had authorized the defendants to use the card for the District's purposes only. The mailings complained of were two invoices sent by the oil company to the District, and the District's check mailed back in payment. Again, it was found that the mailings by the outsiders were not an integral part of the scheme as planned and executed by the defendants, and that, as a matter of fact, it was completely immaterial to them what the oil company did about collecting its bill. As in *Kann*, the conclusion reached was that the mailing was without the requisite intent to further the scheme to defraud.

Both *Kann* and *Parr* clearly stand for the proposition that the mere concurrence of a violation of the general purpose which the relevant federal statute is designed to serve and a use of interstate facilities does not make an act, even though morally reprehensible and violative of state law, a federal crime. That Congress may have prohibited the use of interstate facilities to persons who use those facilities for the purpose of perpetrating frauds does not mean that Congress intends to outlaw that activity under federal law wherever the use of interstate facilities grants to the federal courts a jurisdictional basis to do so. *Cf. Carroll* v. *United States,* 326 F.2d 72, 85-86 (9 Cir. 1963). In this regard the following statement in *Kann* is quite pertinent: "The federal mail fraud statute does not purport to reach all frauds, but only those limited instances in which the use of the mails is a part of the execution of the fraud, leaving all other cases to be dealt with by appropriate state law." 323 U. S., at 94-95.

Similarly, as shown by the clear statutory language, Congress did not intend in § 1952 to reach all wrongs "on the people [effected] by corrupting public officials," but only those wrongs which are violative of specified state laws. The scope of Congressional power and whether it is sufficiently broad to make unlawful the use of interstate facilities for the purpose of corrupting state officials, is not the question. I do not doubt that the power of Congress is this broad, just as I do not doubt that Congress can reach all fraudulent schemes which employ interstate facilities regardless of intent. But our inquiry here must be whether this power was so exercised. The plain wording of § 1952 demonstrates that it was not.

The check sent to Cotten merits special scrutiny. If the bribery of Cotten was complete on September 9, the date on which he received the check, it is obvious that under my interpretation of the statute, the clearing of the check through interstate facilities after September 13 could not constitute a violation of § 1952, because (1) this use of

interstate facilities could not be made with the requisite intent to violate state law, and (2) no act in performance or attempted performance of the Virginia crime of bribery could be made *after* the use of interstate facilities, as required by § 1952. This, I think, is dispositive of the case. In the absence of evidence that Cotten knew that the check was worthless at the time he received it and delayed in making his deposit until he was informed that the check would not "bounce" (a position suggested, but not pressed by the government) there seems to be no reason to find as a matter of state law that the bribe was not completed on the date of receipt.[6] It would be unrealistic to infer repudiation of the check from mere delay in depositing it when the check was received pursuant to a prior agreement.

Assuming, however, that the bribe was not completed at the time of receipt, it seems abundantly clear that it was completed at the time of deposit. By placing the money in his own account, Cotten evidenced an unequivocal intent to "accept" the illicit benefit, the gravamen of the offense under *Va. Code Ann.* § 18.1-279. Surely, a public official could be convicted of bribery if he accepted counterfeit money, believing it to be genuine. Similarly, even if a check which he accepted turned out to be worthless, he would still have accepted a bribe. Thus, collection of the check from the drawee bank occurred *after* the bribe had been completed—even if the bribe was not accepted until the time of deposit—and, accordingly, any use of interstate facilities after that time, specifically bank clearing operations, could not constitute a violation of § 1952 for the same reasons which apply if the bribe is deemed to have been completed on September 9.

But even if it is further assumed that as a matter of state law the bribe was not completed until the check had

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[6] Indeed, the record shows that Leigh, contemporaneously with drawing his check to Cotten, voided certain previously drawn checks so that the check to Cotten would be paid by the bank when presented.

cleared, the same result should obtain, because as a matter of federal law the bank clearing operations do not constitute a use of interstate facilities as contemplated by § 1952. The specific teaching of *Kann* v. *United States, supra,* is that if the interstate mailing is merely collateral to the perpetration of a fraudulent scheme, such mailing is not sufficient to establish a violation of the mail fraud statute. Of course, subsequent decisions, e.g., *United States* v. *Sampson,* 371 U. S. 75 (1962), and *Pereira* v. *United States,* 347 U. S. 1 (1954), recognize that, under the mail fraud statute, use of the mails even after the victim's money has been obtained can be for the purpose of executing the scheme, and thus subject to prosecuton, if it is "incidental to an essential part" of the scheme. But on whatever side of the rather vague line drawn by *Kann* and its progeny the bank clearing in the instant case might fall, an important difference in the mail fraud statute and § 1952 supplies a dispositive answer. The mail fraud statute proscribes conduct where one "knowingly causes" the mail to be used for the purpose of executing the fraud, as well as use of the mail for that purpose. 18 U.S.C.A. § 1341. It was on the ground that each of the defendants "caused" the mail to be used that convictions were upheld in *Pereira* v. *United States, supra,* where the basis for prosecution was the deposit of checks. By contrast, § 1952 is limited to "uses [of] any facility in interstate or foreign commerce, including the mail." Therefore, the reasoning used in *Pereira* to limit the *Kann* holding is not applicable here.

In the expression of my views, little more need be stated. If I am correct in my interpretation of § 1952, the convictions on the substantive counts clearly cannot be supported. And if I am correct in my treatment of the substantive offenses, the conspiracy convictions, under the familiar principle that a conspiracy terminates upon the accomplishment of its unlawful objective, stand on no surer footing. *Grunewald* v. *United States,* 353 U. S. 391 (1957).

I would reverse the judgments and direct the entry of judgments of acquittal.

[Caption omitted in printing]

[Filed April 15, 1969]

ORDER FOR BAIL PENDING CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

Upon the motion of the appellants, by their counsel, and after consultation with other members of the panel,

It is ORDERED that the appellants be admitted to bail pending certiorari to the Supreme Court pursuant to Rule 46(a)(2), Rules of Criminal Procedure, upon their personal recognizance in the penal sum of $5,000.00.

/s/ J. Braxton Crave, Jr.
United States Circuit Judge

[Caption omitted in printing]

Upon the motion of the appellants by their counsel, and for cause shown,

It is ORDERED that the mandates in the above cases be, and they are hereby, recalled; that the Clerk of the United States District Court for the Eastern District of Virginia, return forthwith the certified copies of judgments issued in lieu of mandates; and that the mandates be stayed pending application of the appellants in the Supreme Court of the United States for a writ of certiorari to this Court, provided the application is filed in the said Supreme Court within the time prescribed by law.

/s/ Clement F. Haynsworth, Jr.
Chief Judge

APPENDIX B

Article I, § 9, cl. 3 of the Constitution of the United States provides:

> No bill of Attainder or ex post facto Law shall be passed.

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18 U.S.C. § 1952, provides, in pertinent part:

(a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to–

(1) distribute the proceeds of any unlawful activity; or

(2) commit any crime of violence to further any unlawful activity; or

(3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,

and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3), shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

(b) As used in this section "unlawful activity" means (1) any business enterprise involving gambling, liquor on which the Federal excise tax has not been paid, narcotics, or prostitution offenses in violation of the laws of the State in which they are committed or of the United States, or (2) extortion, bribery, or arson in violation of the laws of the State in which committed or of the United States.

Virginia Code § 18.1-278, et seq., provide:

§ 18.1-278. Bribes to officers or candidates for office.—If any person corruptly give, offer or promise to any executive, legislative or judicial officer, sheriff or police officer, or to any candidate for such office, either before or after he shall have taken his seat, any gift or gratuity, with intent to influence his act, vote, opinion, decision or judgment on any matter, question, cause or proceeding, which is or may be then pending, or may by law come or be brought before him in his official capacity, he shall, upon conviction, be confined in the penitentiary not less than one nor more than ten years. This section shall also apply to a resident of this State who, while temporarily absent therefrom for that purpose, shall make such gift, offer or promise and thereafter return to this State.

§ 18.1-279. Acceptance thereof by officer.—If any executive, legislative or judicial officer, sheriff or police officer, or any candidate for such office, accept in this State, or if, being resident in this State, such officer or candidate shall go out of this State and accept and afterwards return to and reside in this State, any gift or gratuity or any promise to make a gift or do any act beneficial to such officer or candidate under an agreement, or with an understanding, that his vote, opinion or judgment shall be given on any particular side of any question, cause or proceeding which is or may be by law brought before him in his official capacity or that in such capacity he shall make any particular nomination or appointment or take or fail to take any particular action or perform any duty required by law, he shall, upon conviction, be confined in the penitentiary not less than one nor more than ten years and shall forfeit his office and be forever incapable of holding any post mentioned in § 2-26. The word candidate as used in this and the preceding section shall mean anyone who offers himself or is put forward by others as a suitable person or an aspirant for such office.

§ 18.1-282.1. Definitions. – The following words and phrases when used in this article shall have the meanings respectively ascribed to them in this section except where the context clearly requires a different meaning:

(1) *"Benefits"* means a gain or advantage, or anything regarded by the beneficiary as a gain or advantage, including a benefit to any other person or entity in whose welfare he is interested, but shall not mean an advantage promised generally to a group or class of voters as a consequence of public measures which a candidate engages to support or oppose;

(2) *"Party official"* means a person who holds an elective or appointive post in a political party in the United States by virtue of which he directs or conducts, or participates in directing or conducting party affairs at any level of responsibility;

(3) *"Pecuniary benefit"* means a benefit in the form of money, property, commercial interest or anything else the primary significance of which is economic gain;

(4) *"Public servant"* means any officer or employee of this State or any political subdivision thereof, including members of the General Assembly and judges, and any person participating as a juror, advisor, consultant or otherwise, in performing any governmental function; but the term does not include witnesses;

(5) *"Administrative proceeding"* means any proceeding other than a judicial proceeding, the outcome of which is required to be based on a record or documentation prescribed by law including specifically, but not limited to, proceedings before a planning commission and board of zoning appeals. (1968, c. 552.)

§ 18.1-282.2. When person guilty of bribery.—A person shall be guilty of bribery under the provisions of this article:

(1) If he offers, confers or agrees to confer upon another (a) any pecuniary benefit as consideration for or to obtain or influence the recipient's decision, opinion, recommenda-

tion, vote or other exercise of discretion as a public servant or party official or voter, or (b) any benefit as consideration for or to obtain or influence either the recipient's decision, opinion, recommendation, vote or other exercise of official discretion in a judicial or administrative proceeding or the recipient's violation of a known legal duty as a public servant or party official; or

(2) If he accepts or agrees to accept from another (a) any pecuniary benefit offered, conferred or agreed to be conferred as consideration for or to obtain or influence the recipient's decision, opinion, recommendation, vote or other exercise of discretion as a public servant, party official or voter, or (b) any benefit offered, conferred or agreed to be conferred as consideration for or to obtain or influence either the recipient's decision, opinion, recommendation, vote or other exercise of official discretion in a judicial or administrative proceeding or the recipient's violation of a known legal duty as a public servant or party official; or

(3) If he solicits from another (a) any pecuniary benefit or promise of pecuniary benefit as consideration for or in exchange for his decision, opinion, recommendation, vote or other exercise of discretion as a public servant, party official or voter, or (b) any benefit or promise of benefit as consideration for or in exchange for his decision, opinion, recommendation, vote or other exercise of official discretion in a judicial or administrative proceeding or his violation of a known legal duty as a public servant or party official. (1968, c. 552.)

§ 18.1-282.3. Certain matters not to constitute defenses; application of § 18.1-280.—It shall be no defense to any prosecution under § 18.1-282.2 that a person whom the actor sought to influence was not qualified to act in the desired way, whether because he had not yet assumed office, or lacked jurisdiction, or for any other reason. Also it shall be no defense to a prosecution under § 18.1-282.2 that a resident of this State charged with committing an act of bribery was temporarily absent from this State at the time

such act was committed, if such person thereafter returns to this State. The provisions of § 18.1-280 shall be applicable to all prosecutions under this article. (1968, c. 552.)

§ 18.1282.4. Punishment.—Any person found guilty of bribery under the provisions of this article shall be confined in the State penitentiary not less than one nor more than ten years. A public servant found guilty of bribery shall be confined in the State penitentiary not less than one nor more than ten years, shall forfeit his public office and shall be forever incapable of holding any public office in this State. (1968, c. 552.)

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 1371

SIGMUND GOLDBLATT, PETITIONER

v.

UNITED STATES OF AMERICA

No. 1372

ROBERT C. COTTEN, JR., PETITIONER

v.

UNITED STATES OF AMERICA

No. 1373

NATHAN WECHSLER, PETITIONER

v.

UNITED STATES OF AMERICA

No. 2077 Misc.

A. CLAIBORNE LEIGH, PETITIONER

v.

UNITED STATES OF AMERICA

352-481—69

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners seek certiorari to review the denial by the court of appeals of their second petition for rehearing, filed after this Court had denied certiorari and rehearing.

1. After a jury trial in the United States District Court for the Eastern District of Virginia, petitioners and others were convicted of conspiring to violate and violating 18 U.S.C. 1952(a)(3) by using the facilities of interstate commerce in furtherance of a scheme in which certain members of the Fairfax County Board of Supervisors were bribed to render a favorable decision on an application for rezoning of land in Fairfax County. The court of appeals, one judge dissenting, affirmed the convictions, 392 F. 2d 344, and certiorari was denied, 392 U.S. 932, rehearing denied, 393 U.S. 902. The evidence is set forth in detail in that opinion of the court of appeals and in the government's Brief in Opposition to the prior petition for a writ of certiorari, No. 1377, O.T., 1967.

The pertinent feature of the proof for present purposes is that, a few days prior to enactment of 18 U.S.C. 1952, a check was delivered as payment of the bribes.[1] The essential object of the conspiracy—the

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[1] The subsequent check to petitioner Cotten in payment of his

securing of the rezoning—did not, however, occur until approximately ten months later when the rezoning application was finally granted. The principal contention on appeal, in the prior petition for certiorari and here now, was that, since the minimum elements necessary to support a bribery prosecution under state law had occurred (and the offense of bribery under Virginia law was in that sense complete) before enactment of the federal statute,[2] the statute as applied to them constituted an *ex post facto* law.

Petitioners' argument in the earlier petition was to some extent based on the position taken by the government with respect to 18 U.S.C. 1952 in its jurisdictional statement in *United States* v. *Nardello* (No. 1277, O.T., 1967). Petitioners contended, and the gov-

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share, however, cleared the banks, through the use of interstate facilities, after passage of 18 U.S.C. 1952. See 392 F. 2d at 347.

[2] The statute (18 U.S.C. 1952) provides in pertinent part:

> (a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to—
>
> * * * * *
>
> (3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,
>
> and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3), shall be fined not more than $10,000 or imprisoned for not more than five years, or both.
>
> (b) As used in this section "unlawful activity" means * * * (2) extortion, bribery, or arson in violation of the laws of the State in which committed or of the United States.

ernment disputed in its Brief in Opposition, that the positions advanced by the United States in the two cases were inconsistent. On the same day the Court noted probable jurisdiction in *Nardello,* 392 U.S. 923, it denied petitioners' petition for certiorari, 392 U.S. 932. A petition for rehearing of the denial of certiorari, again claiming dependence on *Nardello,* was thereafter denied. 393 U.S. 902.

2. In its subsequent decision in *Nardello,* 393 U.S. 286, the Court sustained the government's position that Congress used the term "extortion" in 18 U.S.C. 1952 in a generic sense, so as to embrace all extortionate conduct punishable by state law, whether or not the particular state statute covering the conduct was denominated under the heading of "Extortion". Petitioners then sought and received leave to file a second petition for rehearing in the court of appeals.[3] After response by the government, and what it termed "consultation with non-panel members of the court," the original panel of the court of appeals denied the petition for rehearing in a *per curiam* opinion and order, Judge Winter dissenting as he has throughout.

3. In the petition for rehearing below, and in their present separate petitions for writs of certiorari, petitioners have urged that the decision of this Court in *Nardello* undermined the rationale of the prior court of appeals opinion sustaining their convictions. The argument is essentially a reiteration of their conten-

[3] Before seeking certiorari in the first instance, petitioners had filed a petition for rehearing en banc in the court of appeals, which denied it 5–1.

tions in this regard in the prior petition for a writ of certiorari.

Nardello is in no way inconsistent with the decision sustaining petitioners' convictions for violating 18 U.S.C. 1952. Petitioners purport to find inconsistency in the recognition by this Court in *Nardello* that the principal purpose of Section 1952 is to assist the states in the enforcement of their laws against bribery and extortion. This objective is reflected by the statutory definition of the terms "bribery" and "extortion" by reference to state law and the consequent withholding of federal penalties for conduct which does not promote or carry on an offense of these types recognized by state law. See *Nardello, supra,* 393 U.S. at 293. Neither the language of the statute nor its interpretation in *Nardello,* however, supports petitioners' argument that the reach of the federal statute is limited to the minimum events whose occurrence each state has determined to be sufficient to permit local prosecution.[4] The wording of Section 1952(a)(3)—prohibiting the use of interstate facilities with intent to "otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of * * * [bribery]"—demonstrates that the focus of the federal enactment is the *entire* enterprise having as its purpose the corruption of state

[4] See 18 U.S.C. 1952(a)(1), prohibiting the use of interstate facilities with intent to "distribute the proceeds of any unlawful activity." Unless the distribution of proceeds constituted an element of the state's laws against bribery or extortion, the conduct prohibited by the federal statute would *necessarily* occur after the completion of the substantive state offense.

officials *in violation of the state's laws against bribery. United States* v. *Kubacki*, 237 F. Supp. 638, 642–643 (E.D. Pa.).

Petitioners do not and can not deny that an essential object of the conspiracy proved here was that petitioner Cotten would enjoy the promised compensation for his vote—an object accomplished through the use of interstate facilities after Section 1952 became effective (see note 1, *supra*), as was the ultimate goal of favorable action on the rezoning application. The broad language used by the statute clearly encompasses such conduct designed to "carry on" the scheme that reaches its climax—but not its denouement—with the corrupt offer.

That performance of the minimum elements of the state offense was not intended to confine the focus and applicability of the federal statute is underscored by the fact that a federal offense may be committed *before* the elements minimally necessary for state prosecution have occurred. The Act prohibits using interstate facilities with intent to "establish" or "promote" an unlawful activity if thereafter the user attempts to perform such an act—whether or not a state bribery offense is completed. Thus, while state law is undoubtedly the touchstone for determining whether the conduct falls within the federal statute, the applicability of this Act does not stand or fall on fixing the time when, for the state's purposes, the crime is complete.

The legislative purpose behind passage of 18 U.S.C. 1952 is well in accord with its application to the facts here. Even though Virginia has determined that peti-

tioners' conduct should be subject to prosecution at the time of the offer of a bribe or its acceptance (see *Ford* v. *Commonwealth*, 177 Va. 889, 15 S.E. 2d 50), this does not mean that the state has no interest in petitioners' subsequent activities designed to effectuate the unlawful scheme. The effect of the bribery continues as long as the transaction has not been completed on both sides, for throughout that period the payment of money will continue to influence official action. The holding of the court below—that a conspiracy to violate Section 1952 may be evidenced by the use of an interstate facility *during the period of the bribery scheme*—permits the federal statute to serve its intended purpose of aiding the enforcement of Virginia's laws by closing the channels of interstate commerce to those who would use them to carry out their plots against certain types of local laws. This construction is not inconsistent with *Nardello;* on the contrary, it is required by the Court's recognition that "[t]he legislative response was to be commensurate with the scope of the problem." 393 U.S. at 292. This conclusion is also in accord with the interpretation given the statute by the only other court which has considered the instant question. *United States* v. *Kubacki*, 237 F. Supp. 638, 642–643 (E.D. Pa.); cf. *McIntosh* v. *United States*, 385 F. 2d 274 (C.A. 8).

It is therefore respectfully submitted that the petitions for writs of certiorari should be denied.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 1371

SIGMUND GOLDBLATT, *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITIONER'S REPLY

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PETITIONER'S REPLY

The present petition is not a rehash of the unsuccessful petition filed last term. While the *ex post facto* effect remains in the case, the intervening opinion in *Nardello* required a significant reevaluation of the majority holding below, as Judge Winter pointed out (Pet. App. A at 4a). Compelled by *Nardello* to apply Virginia law, the majority purported to do so but (1) refused to follow the authoritative construction of Virginia's bribery statute as announced by her highest court and (2) thought itself empowered to view the substantive elements of state criminal statutes "generically" (Pet. App. A at 3a). This holding

raises entirely different problems from those tendered last term.

Significantly, the Government makes no effort to sustain the rationale of the court below, nor does it deny that the "generic element" test announced in the prevailing *per curiam* is so uncertain and vague as to render § 1952 constitutionally infirm. What the Government does say is that petitioner's conviction for conspiracy should nonetheless be upheld on the basis of a theory different from that adopted below.

1. The Government notwithstanding (G. Memo. at 2, 6), the object of the conspiracy charged in this case was *not* to secure a rezoning. The sole object charged was a violation of 18 U.S.C. § 1952(a)(3), *i.e.*, the use of interstate facilities with the intent to "establish and carry on" a bribe in violation of Virginia law (CA 2-3). The indictment could charge no other object for it is fundamental that the object of a conspiracy under 18 U.S.C. § 371 to commit a particular substantive offense is *always* the substantive offense itself. *Gebardi* v. *United States*, 287 U.S. 112, 120 n.4; *United States* v. *Britton*, 108 U.S. 199, 205-207.[1] Moreover, a "conspiracy to commit a particular substantive offense cannot exist without *at least* the degree of criminal intent necessary for the substantive offense itself." *Ingram* v. *United States*, 360 U.S. 672, 678. Accordingly, the conspiracy count here cannot be divorced from the substantive offense.[2]

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[1] See also, *United States* v. *Konovsky*, 202 F.2d 721, 725 (7 Cir. 1953); *Fulbright* v. *United States*, 91 F.2d 210, 212 (8 Cir. 1937); *Galatas* v. *United States*, 80 F.2d 15, 17 (8 Cir. 1935).

[2] The Government makes no effort to sustain petitioner's conviction on the substantive count. See 392 F. 2d at 348 n. 6. That petitioner received a concurrent sentence on that count may not be determinative. *Benton* v. *Maryland*, No. 201 (Oct. T. 1968).

2. Section 1952(a)(3) requires three items of proof. First, the Government must show that the defendant used an interstate facility. Second, the Government must show that such use was accompanied with an intent to "promote, manage, establish, carry on or facilitate [the] promotion, management, establishment, or carrying on" of bribery *in violation of state law*. And third, the Government must show that following the use of interstate facilities with the proscribed intent, the defendant committed an act to "promote, manage, establish, carry on or facilitate [the] promotion, management, establishment, or carrying on" of bribery *in violation of state law*.

Since § 1952(a)(3) does not require a completed state crime, the Government correctly asserts that the "federal offense may be committed before the elements minimally necessary for state prosecution have occurred" (G. Memo. at 6). But it does not follow that a § 1952(a)(3) offense may be committed *afterwards*. One cannot use an interstate facility with intent to commit a crime which has already been committed. One cannot "thereafter" do an act to further commission of a crime that has already been committed.[3] Nor can one conspire to do so. Thus, the court below correctly identified the crucial inquiry: "'[t]he issue that divided us before was that of the duration of bribery

[3] The statute does not proscribe conduct "designed to 'carry on' the scheme that reaches its climax—but not its denouement—with the corrupt offer" (G. Memo. p. 6), it proscribes conduct to "carry on" bribery in violation of State law. "Carry on" means "to advance, or help forward, continue * * * keep up; as, to carry on a design." Webster's New International Dictionary (2d ed. 1961). Cf. *Cooper Mfg. Co.* v. *Ferguson*, 113 U.S. 727, 735-736. As with the travel, intent and "thereafter" elements, one cannot advance or help forward a crime that has already been advanced to completion.

admittedly prohibited by the State of Virginia—whether it extended to that point in time at which the zoning corruption was accomplished" (Pet. App. A at 2a). Or, in the words of *Nardello*, the question is whether "the particular State involved prohibits the * * * activity charged." 393 U.S. at 295.

The activity prohibited by Virginia's bribery statutes, as the Government finally concedes (G. Memo. at 2, 6-7), is the giving or receipt of a bribe. And, as the Government also concedes, that bribe was both given and received before § 1952 became law (G. Memo. at 2-3). Nothing thereafter could undo the crime of bribery, and nothing thereafter was prohibited by the Virginia bribery statutes specified in the indictment (CA 2-3), or by any other Virginia statute. Accordingly, petitioner's conviction was barred by the *ex post facto* clause unless, as the majority below held, federal courts are free to view the substantive elements of state crimes "generically" (Pet. App. at 3a).

3. Finally, the Government's reliance (G. Memo. at 6, 7) on *United States* v. *Kubacki*, 237 F. Supp. 638, is startling. *Kubacki* was a prosecution under § 1952(a)(1) for *distributing* the proceeds of a bribe in interstate commerce. 237 F. Supp. at 640 and n.2. Obviously, one cannot distribute the proceeds of a bribe until after it has been paid. 237 F. Supp. at 643. But, petitioner was convicted for conspiracy to violate § 1952(a)(3) (G. Memo. at 2). If the Government is now arguing that that conviction can be sustained on a *Kubacki* rationale under § 1952(a)(1), *Cole* v. *Arkansas*, 333 U.S. 196, will have to be overruled.

CONCLUSION

Squarely posed in this case is a question bound to recur not only under § 1952, but under the many other federal criminal statutes which incorporate, assimilate or refer to state statutes as essential ingredients of federal crimes. This case, overlaid with the constitutional urgency of the *ex post facto* problem, presents an appropriate and compelling vehicle for resolution of that question. The petition for writ of certiorari should be granted.

Respectfully submitted,

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SUPREME COURT U. S.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 1373

NATHAN WECHSLER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITIONER'S REPLY

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PETITIONER'S REPLY

The Memorandum of the United States in Opposition to the Petition points up (1) the error of the court below and (2) the importance of the issue presented.

1. Petitioner does not contend that only the *minimum* elements necessary to a bribery prosecution in Virginia occurred before the Travel Act (18 U.S.C. 1952) was passed on September 13, 1961. Rather, petitioner contends that *all* the elements necessary to a bribery prosecution in Virginia occurred before passage of the Travel Act.

Neither does petitioner contend that the inconsistency between *Nardello*[1] and the decision below is based on *Nardello's* recognition that the principal purpose of the Travel Act is assisting states in enforcing their laws against bribery. Rather, he contends that the inconsistency between *Nardello* and the decision below is that *Nardello* requires that the prosecution must be tied to an activity specifically prohibited by state law. Obviously that activity must not precede the enactment of the Travel Act.

The real difference between petitioner and the United States is the scope of the words "promote, manage, establish, carry on, or facilitate the promotion, management, establishment or carrying on" of bribery under Virginia law, as these words are used in 18 U.S.C. 1952(a)(3). The United States says that these words cover the "entire enterprise," and that anything done "during the period of the bribery scheme" falls within those words, ci ing *United States v. Kubacki*, 237 F. Supp. 638, 642-643 (E.D. Pa.). But *Kubacki* was brought under 18 U.S.C. 1952(a)(1), which proscribes the use of interstate facilities with intent to distribute the proceeds of a bribery. The Government is trying to expand the application of the statute by using new words, contrary to the intent of Congress. If the "entire enterprise" or the whole "period of the bribery scheme" were covered by the "promote, manage," language of § 1952 (a)(3), there would be no need for § 1952(a)(1). The very presence of 1952(a)(1) shows that the violation encompassed by the "promote, manage" language ends short of the distribution of the bribery proceeds, that is, short of the end of what the government calls the "entire enterprise." The violation ends, in other words, with the completion of the state offense of bribery. Petitioner was not charged with "distribution," and he cannot be convicted as though he were. *Cole v. Arkansas*, 333 U.S. 196 (1948).

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[1] *United States v. Nardello*, 393 U.S. 286 (1969).

The Government contends, in support of its "entire enterprise" theory, that § 1952 may even be violated before a state law is violated, as by the use of an interstate facility with intent to promote bribery, whether or not the bribery is ever accomplished. This may be true, but it does not prove the converse, namely, that a defendant may have the necessary intent to promote a crime that has already been completed.

It seems obvious that any interest Virginia may have in post-offense activities is not pertinent, the Government's Memorandum, page 7, to the contrary. Under the Travel Act, the interest of Virginia that calls for federal assistance in enforcement must be the offense itself as proscribed by the Virginia statute. Anything more than this would make the Travel Act unconstitutionally vague.

2. All of the above shows the importance of this case. If the Government intends to prosecute for activities which fall within its theory of the "entire enterprise" but which occur after the state offense is complete or which are not necessary or essential parts of the state offense, then it is important for this Court to determine now whether such prosecutions will stand or fall.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR REHEARING

Petitioner respectfully petitions the Court for rehearing of the denial of his Petition for a Writ of Certiorari entered June 23, 1969. As grounds for rehearing, not previously presented, the petitioner states that,

(1) the United States was collaterally estopped from proceeding to trial on the count on which petitioner was convicted; and

(2) it has recently come to petitioner's counsel's attention that the United States withheld during trial material Jencks statements to which petitioner was entitled.

I

Petitioner was acquitted by the Court on Count 2, the substantive count of a two-count indictment; at the end of the Government's case (Jt. App. 288). He was convicted by the jury on Count 1, the conspiracy count, at the end of the entire case (Jt. App. 390). Count 2 alleged an offense under the so-called Travel Act, 18 U.S.C. 1952, enacted September 13, 1961.[1] Count 1 alleged a conspiracy under 18 U.S.C. 371 to violate 18 U.S.C. 1952.[2]

The acquittal on one count and the conviction on the other are contradictories.[3] With the acquittal on Count 2 the United States is collaterally estopped from asserting any facts which support Count 1 after September 13, 1961, the effective date of § 1952. The facts necessarily found for petitioner in connection with Count 2 require a dismissal on Count 1 also since the Court's findings were res judicata as to such facts and the Government was estopped from relitigating them (*Sealfon v. United States*, 332 U.S. 575; see also concurring opinion of Mr. Justice Black in *Williams v. United States*, 341 U.S. 70, 85)[4] and since peti-

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[1] This date is important, since it marks not only the enactment of § 1952 but also the beginning of the offense alleged in Count 2 and of the overt acts alleged in Count 1.

[2] Petitioner had moved for a judgment of acquittal at the close of the Government's case (C.A. 287). This motion was granted as to Count 2 on January 11, 1967 (C.A. 288), but denied as to Count 1. Petitioner again moved for acquittal as to Count 1 at the close of the whole case (C.A. 348). After the verdict of January 14, 1967, petitioner moved for a new trial on the ground that following the judgment of acquittal as to Count 2 the Court erroneously refused to dismiss Count 1 (C.A. 396).

[3] Petitioner, however, does not take exception to the line of cases which hold that an acquittal on a substantive count is not, in and of itself, a bar to conviction on a count charging a conspiracy to commit the crime charged in the substantive count. The unique facts of this case distinguish it from that line of cases.

[4] See also the following Circuit Court opinions: *United States v. DeAngelo*, 138 Fed. 2d 466 (C.A. 3, 1943); *Cosgrove v. United States*, 224 Fed. 2d 146 (C.A. 9, 1955); *Yawn v. United States*, 244

tioner cannot be convicted of conspiring to commit an act which is not yet a crime, *Parr v. United States,* 363 U.S. 370, 393.

Inasmuch as a "fundamental principle of justice" is involved (*United States v. Oppenheimer,* 242 U.S. 85, 88, 37 S.Ct. 68) and since petitioner will be deprived of his liberty because of the Court's error with respect to Count 1, it is important that this Court consider this petition.

The facts relevant to this petition pertaining to the indictments are as follows:

Count 1 charges that from January 1, 1961 to July 30, 1962 petitioner and eight other defendants conspired to violate 18 U.S.C. 1952, in that they conspired to use or cause to be used interstate facilities and travel to establish and carry on and facilitate the establishment and carrying on of bribery in violation of §§ 18.1-278 and 279 of the Virginia Code; and that the conspiracy was to be accomplished through the bribery of three supervisors of Fairfax County, Virginia, by petitioner and his three partners (who were also defendants) in connection with the rezoning of 84 acres of land in Fairfax County. The nine defendants were petitioner and his three partners (Sigmund Goldblatt, George Faigen and Seymour Faigen), the three Fairfax County supervisors (A. Claiborne Leigh, Stuart T. DeBell and Robert Cotten, Jr.), Lytton Gibson, an attorney retained to prepare and present the rezoning application, and William C. Burrage, the Director of Planning for Fairfax County.

Count 1 charges the following overt acts, all dated after September 13, 1961: On September 15, 1961 one of the supervisor defendants deposited a check for $1,000; on July 25, 1962 Gibson appeared before the supervisors in support of the rezoning application; on the same day Burrage rec-

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Fed.2d 235 (C.A. 5, 1957); *United States v. Kramer,* 289 Fed.2d 909 (C.A. 2, 1961). All of these cases except *Cosgrove,* involved earlier acquittals on substantive charges and later indictments for conspiracies.

ommended in favor of the rezoning and the three supervisors voted favorably; on June 17, 1962 Goldblatt wrote a letter to Gibson about the rezoning.

Count 2 charges that from September 13, 1961 to July 26, 1962 the same nine defendants travelled in interstate commerce and caused others to do so, and used and caused others to use interstate facilities to promote, establish, manage and carry on and facilitate the promotion, establishment, managing and carrying on of bribery in violation of §§ 18.1-278 and 279 of the Virginia Code, and thereafter performed acts to facilitate the promotion, establishment, management and carrying on of said unlawful activity.

Although the terminal dates alleged in the two counts differ by four days they are really the same. There is no evidence of anything between July 26 and July 30, 1962. The rezoning was accomplished on July 25, 1962, and that is the real terminal date for both counts.

The initial dates, however, are of controlling importance. The initial date under Count 2 is September 13, 1961, the date that 18 U.S.C. 1952 was enacted. No earlier date could have been alleged for Count 2, because § 1952 would have been ex post facto to anything prior to that date. The initial date in Count 1 is January 1, 1961 when the conspiracy allegedly began.[5] Now, petitioner was acquitted by the Court on Count 2 at the close of the Government's case. This has to mean that the Court found that petitioner did nothing after September 13, 1961, either personally or through another (*Pinkerton v. United States*, 328 U.S. 640), in connection with the alleged offenses. Two of his partners were found by the jury to have carried on their activity after September 13, 1961, but petitioner's acquittal on Count 2 can only mean that his activity had to have stopped before September 13, 1961 and that any conspiratorial

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[5]Note that Count 1 alleges a conspiracy to violate a statute which was not enacted until nine months after the conspiracy was allegedly formed.

activity on his part had to have taken place prior to that date.[6]

Petitioner's acquittal conclusively determined that petitioner engaged in no criminal activity, conspiratorial or otherwise, after the enactment of § 1952. It constitutes a finding that if petitioner engaged in any concerted activity prior to September 13, 1961, he withdrew from any such activity before § 1952 was enacted. His activity, therefore, cannot possibly be criminal because a conspiracy to commit an act which is not a crime is itself not a crime (*Parr v. United States*, 363 U.S. 370, 393).

II

The conviction is invalid on due process grounds in that the United States withheld from the defense at the time of trial certain Jencks Act statements of a Key Government witness, Robert Paul Peachey.

In October 1968 Peachey sued petitioner and others civilly because of a motion for a new trial in this case which they had filed charging Peachey with perjury.[7] On January 2, 1969 Peachey, on deposition in the civil case, testified that he had been interviewed by Internal Revenue Service agents on at least two occasions. During the first interview, which took place in late 1964 or early 1965, the agents made notes and took away with them a tape recording of the entire interview. Peachey testified that a second interview was conducted in the Summer of 1966, at which time he related to the agents, all of whom were taking notes, his

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[6]Of petitioner's partners in Trailer Court Ventures, one was also acquitted by the Court on Count 2 (C.A. 288) and convicted by the jury on Count 1, and the other two were each convicted on both counts. Of the other defendants, two of the supervisors were convicted on both counts, one supervisor was acquitted by the Court on both counts (C.A. 335), and the other two defendants were also acquitted by the Court on both counts (C.A. 343).

[7]*Peachey v. Boothe, Wechsler, et al.*, Corporation Court, Alexandria, Va., at Law No. 8586.

knowledge of suspicious circumstances regarding the "zoning cases."

At the beginning of the trial of the present case the United States turned over to defense counsel a number of Jencks Act memoranda, but none relating to Peachey, and the United States represented that the memoranda which it turned over were all that it had. The material which Peachey described in his deposition, however, appears to lie clearly within the purview of 18 U.S.C. 3500. *Clancy v. United States*, 365 U.S. 312, 314, 81 S. Ct. 645, 647 (1961). The government's withholding of such material and admitting its existence only as late as January 1969 (App. A, *infra*, p. 9) in and of itself invalidates the conviction.[8] *Clancy v. United States, supra.*

This Court on Petition for Certiorari or Rehearing has previously taken notice of intervening circumstances, bringing to light hitherto unknown violations of a defendant's constitutional rights *dehors* the trial and appellate record, particularly in eavesdropping and wiretapping cases. (See: *Black v. United States*, 385 U.S. 26, 87 S. Ct. 190 (1966); *Alderman v. United States*, 393 U.S. ___, 89 S. Ct. 961 (1969)).

CONCLUSION

This petition should be granted and the conviction vacated on the grounds (1) that petitioner's conviction on Count 1 is invalid under the doctrines of res judicata and collateral estoppel, and (2) that the conviction is invalid under the Jencks Act. If the United States, in replying hereto, raises issues of fact or law regarding the Jencks Act material, then, as a minimum, the case should be remanded to the District Court for an evidentiary hearing. *Campbell v. United States*, 373 U.S. 487, 83 S. Ct. 1356 (1963); *Hillard v. United States*, 317 F.2d 150 (C.A.D.C., 1963).

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[8] A motion for a new trial based on the Jencks Act has been filed in the District Court. The District Court, however, has not heard this motion, because of the pendency of the Petition for Certiorari in this case.

Pending the disposition of the remand, Petitioner's commitment should be stayed.

Respectfully submitted,

PHILIP F. HERRICK
Shoreham Building
Washington, D. C. 20005
HANS A. NATHAN
NORMAN E. BAYLES
1730 K Street, N. W.
Washington, D. C.
Attorneys for Petitioner

CERTIFICATE

We certify that this petition is presented in good faith and not for delay, and that it is restricted to the grounds specified in Rule 58.2.

Philip F. Herrick

Hans A. Nathan

APPENDIX A

AFFIDAVIT IN SUPPORT OF PETITION FOR REHEARING

DISTRICT OF COLUMBIA, ss:

PHILIP F. HERRICK, being duly sworn, deposes and says:

1. I am attorney for Petitioner NATHAN WECHSLER and make this affidavit in support of Petitioner's Motion for Rehearing.

2. On January 10, 1967, following the Court's direction to the prosecution to turn over to defense counsel all Government memoranda of all witnesses that would be called, counsel for the defendants received from the prosecution a number of memoranda of witness interviews, but no memorandum of an interview with Robert Paul Peachey. The Government stated that the memoranda it turned over were all that it had.

3. Peachey testified at the trial herein as a key witness for the prosecution.

4. On January 2, 1969, Peachey was deposed in connection with a civil case brought by him a few weeks earlier (*Peachey v. Boothe, et al.*, Law No. 8586, Corporation Court of the City of Alexandria). During that deposition, Peachey testified, among other things, that agents of the Internal Revenue Service made notes of several interviews which had been conducted prior to the trial of this case and that a tape recording was made of one of his statements.

5. On January 7, 1969, I spoke with Mr. Spratley, the United States Attorney, and with Mr. McElroy of the Internal Revenue Service, at Richmond, Virginia, calling the Government's attention to Peachey's deposition testimony. Messrs. Spratley and McElroy agreed to search their files to ascertain whether copies of any interview notes or memoranda were still extant.

6. On January 13, 1969, Mr. Spratley informed me that the Government had two sets of notes, one relating to an

interview with Peachey on March 22, 1965 which was connected only with Peachey's own personal tax problems, and one relating to an interview with Peachey on July 28, 1966 which contained at least nine items.

7. Mr. Spratley further informed me that the July 28, 1966 memorandum contained an item pertaining to the rezoning matter but only in a way which Mr. Spratley stated was unrelated to this case; and an item concerning an allegation by Peachey that "X" approached him and said that he was the "bag man" for "Y" and "Z", members of the Board of Supervisors, and that for $40,000, "X" could insure that the property would be rezoned. Mr. Spratley declined to reveal the names of "X", "Y" or "Z".

8. Although defense counsel requested the Government to produce these memoranda, the Government declined to produce any statements or memoranda except the excerpted version of the July 28, 1966 interview notes annexed hereto as Exhibit A.

9. This document admittedly contains at least two other paragraphs relevant to the subject matter of this proceeding. No defense counsel has seen, because the Government will not voluntarily exhibit, the complete memorandum.

10. Neither defendants, nor their trial counsel, knew, or, in the exercise of reasonable diligence should have known, of the existence of these memoranda until on or about January 2, 1969. At trial, defense counsel relied upon the statement of Government counsel that the documents turned over were all that the Government had.

/s/ Philip F. Herrick

Subscribed and sworn to before me this 10th day of July, 1969.

/s/ Catherine L. Guyon
Notary Public, D.C.

(Notarial Seal) My Commission expires May 31, 1973

EXHIBIT "[redacted]"

UNITED STATES DEPARTMENT OF JUSTICE

United States Attorney
Eastern District of Virginia
Post Office Box 1257
Richmond, Virginia 23210

CVSJr:ewr

January 13, 1969

Philip F. Herrick, Esquire
Shoreham Building
Washington, D.C. 20005

Re: *U.S. v. Wechsler, et al.*

Dear Phil:

Although it is the Government's position that the attached statement is not Jencks material, I am nevertheless giving you the interview report. The remainder of the interview report does not pertain to the Wechsler case and if you have any questions concerning this aspect, please take them up with Ed Joyce.

Sincerely,

/s/ Vernon
C. V. Spratley, Jr.
United States Attorney

Encls.

cc: Edward T. Joyce, Esquire
Organized Crime & Racketeering Sec.
Crim. Div., Dept. of Justice
Washington, D.C. 20530

Memo Conversation with Paul Peachy:

July 28, 1966
Intelligence Division
Internal Revenue Service
Bailey's Cross Roads, Va.

Present: Special Agent Kenneth E. McElroy
Special Agent Max C. Johnson

I told Mr. Peachy I was investigating the income tax affairs of

8. That also prior to the board meeting for the zoning GEORGE FAIGEN (who was also having his property adjacent to his rezoned) called him and told him 1) "don't even appear", we don't have to be there because, 2) the rezoning is going to go through and 3) I had to pay through the nose for it.

/s/ Kenneth E. McElroy /s/ Max C. Johnson